Supreme Court, U.S.
FILED
MAY 2 1989
JOSEPH F. SPANIOL, JR.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Where an employer has long maintained a collectively bargained program of benefits for former employees, which treats older employees more favorably than younger employees, may a court dissect the total program into parts and hold that one part, isolated from the remainder, discriminates against older employees under § 4(a)(1) of the Age Discrimination in Employment Act of 1967 ("ADEA").

2. Whether a plan that exists and pays benefits fails to qualify as a "bona fide employee benefit plan" within the meaning of § 4(f)(2) of the ADEA because it lacks age-related cost factors; this same question is now pending before the Court in *Public Employees Retirement System v. Betts*, No. 88-389.

3. Whether an employer whose conduct at the time was not contrary to the law as then pronounced and applied by other federal courts may be held in "willful" violation of the ADEA.

PARTIES

Westinghouse Electric Corporation*

Equal Employment Opportunity Commission

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* Pursuant to Supreme Court Rule 28.1, Westinghouse lists below its parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates:

Compagnie des Dispositifs Semiconducteurs Westinghouse (CDSW)
Computer Aided Training Company, Incorporated
Eletrocontroles Villares, Ltda. (EVL)
Eletromar Industria Eletrica Brasileira, S.A.
Email Limited
Ercole Marelli & Company, S.p.A.
Escorts, Ltd.
Franco Tosi, S.p.A.
Galileo Uruguaya, S.A.
Industria IEM, S.A. de C.V.
Infrared Fiber Systems, Inc.
Integrated Communication Systems Inc.
Integrated Power Corporation
Maihak A. G. (H.)
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Mex Control S.A. de C.V.
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Mitsubishi Nuclear Fuel Co., Ltd.
Schneider S.A.
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Turbine Metal Technologies, Inc.
Tyree Industries Limited
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Vektron S.A.
W.S. Insulators
Westinghouse-Airship Industries, Inc.
Horizon International Television, Inc.
Harbinger*EDI Services, Inc.
Industrias Electronicas, S.A. (INDELEC)
Transformadores de Distribucion Trade, S.A. (TRADESA)

Westinghouse Electro Metalurgicas C.A. (WEMCA)
CMW Sistemas, Ltda. (CMWS)
CMW Equipamentos, Ltda. (CMWE)
China Industry Services Co., Ltd.
Elektrik Techizati Imalti Tesisati, A.S.
Hyosung Heavy Industries, Ltd.
IEM S.A.
Industry Services Company of Saudi Arabia, Ltd. (ISCOSA)
Korea Industry Services Co., Ltd.
Mitsubishi-Westinghouse Electric SGC, Ltd.
Transformadores TPL S.A.
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Westinghouse Electric Supply Company of Saudi Arabia (WESCOSA)
Electro—Fanal S.A.
Westinghouse, S.A. (WESA)
Iberatomica
Westinghouse Projectos Electricos, S.A. (WEPESA)
WEXICO Systems and Services, Ltd.
Westinghouse E-Mail, Ltd.
Cemac Westinghouse Pty. Ltd.
Contradores Electricos, C.A.
Westinghouse Saudi Arabia Ltd. (WSAL)
Westinghouse Motor Company

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No. ——

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Westinghouse Electric Corporation ("Westinghouse") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in *Equal Employment Opportunity Commission v. Westinghouse Electric Corp.*, 869 F.2d 696 (3d Cir. 1989).

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-45a) is reported at 869 F.2d 696. The opinion of the United States District Court for the Eastern District of Pennsylvania (App., *infra*, 51a-102a) is reported at 632 F. Supp. 343.

JURISDICTION

The court of appeals initially entered its judgment on November 30, 1988. On December 14, 1988, Westing-

house filed a timely petition for rehearing and suggestion for rehearing in banc. On January 5, 1989, the court of appeals denied the suggestion for rehearing in banc. App., *infra*, 46a. On February 2, 1989, the court of appeals granted the petition for rehearing and entered its final judgment. App., *infra*, 47a-50a. The district court had jurisdiction under 29 U.S.C. § 626 and 28 U.S.C. § 1331; the court of appeals had jurisdiction under 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The case involves §§ 4(a)(1) and 4(f)(2) of the Age Discrimination in Employment Act of 1967, as amended ("ADEA"), 29 U.S.C. §§ 623(a)(1) and 623(f)(2) (1982). These provisions are reproduced at App., *infra*, 103a.

STATEMENT

A. Westinghouse's Post-Employment Benefit Program: Its History And Development

Through collective bargaining, Westinghouse has for many years maintained a program to provide income maintenance to its employees after the termination of their employment. App., *infra*, at 8a-13a, 54a-59a. Essentially, in cases of plant closure or work relocation, this program provided that employees who satisfied certain requirements related to age, service, and circumstances of termination would be eligible for one of two basic benefits: immediate retirement benefits, or severance and deferred retirement benefits. *Id.*[1] Westinghouse and the

[1] The retirement benefits include immediate monthly pension benefits for life; monthly pension supplements until the onset of Social Security benefits; and lifetime insurance benefits. *See* App., *infra*, 23a; *see also* J.A. 1536, 1539-40, 1555. Deferred retirement benefits are monthly pension benefits for life commencing at age 65, or actuarially-reduced pension benefits for life commencing at an earlier age. J.A. 1537, 1559.

unions representing Westinghouse's employees have always intended and agreed that employees would be eligible for one or the other of these benefits, but not both. J.A. 515, 534-36, 1409-10. Westinghouse and the unions representing its employees have also always understood, and the court below accepted (App., *infra*, at 16a), that the value of the immediate retirement benefits provided to eligible employees at the time of their termination is greater than the combined value of the severance and deferred retirement benefits provided to other employees. J.A. 528-32, 999-1000, 2088-92.[2]

Westinghouse's collective bargaining agreements have linked pension and severance benefits since the first agreement to provide for severance benefits was negotiated in 1960. J.A. 568a, 1409-10. Prior to 1960, the only benefits available in cases of plant closure or work relocation were retirement benefits for those employees who had satisfied the normal age and service requirements of the retirement plan. J.A. 534, 539, 568a. In 1960, the agreements liberalized the criteria for receiving an immediate pension. J.A. 1785-86, 1792, 1794, 1798. They also, for the first time, provided severance benefits to employees who, when terminated through no fault of their own, were ineligible for immediate retirement benefits. J.A. 534-35, 1409-10.

With this linkage between immediate retirement benefits and severance benefits in place, Westinghouse and its employees' unions in negotiations after 1960 increased the benefits available under both the retirement and severance components. Concomitantly, they expanded the pool of employees eligible to receive the more valuable immediate retirement benefits by reducing the age and service requirements applicable in plant closure and re-

[2] Westinghouse has also provided its terminated management personnel with a benefit program that largely parallels the collectively bargained benefit program. App., *infra*, at 10a-11a, 13a, 60a-61a

lated situations. *See* App., *infra*, at 26a; *see also* J.A. 1765, 1720-21, 1704, 1696, 1598-99, 1344-46, 1324-27, 1302-06.

In 1982, Westinghouse and the unions gave all represented retirement-eligible employees, who were terminated through no fault of their own, the choice to elect immediate retirement benefits or severance and deferred retirement benefits—at their option. J.A. 1549-50, 1272-80. Thus, throughout the history of Westinghouse's post-employment benefit program, older employees have always been able to obtain the more valuable benefit package. J.A. 528-32, 999-1000.

B. The Proceedings In The District Court

In November 1983, the Equal Employment Opportunity Commission ("EEOC") filed this suit (J.A. 15-20), alleging that Westinghouse's post-employment benefit program at one location was in willful violation of the ADEA. After allowing amendments that converted the case into a nationwide action, the district court held that the "denial of severance pay to employees who take retirement is age-based discrimination." App., *infra*, at 85a. It further determined that the "bona fide employee benefit plan" exemption of § 4(a)(2) of the ADEA, 29 U.S.C. § 623(f)(2), did not protect Westinghouse's actions. *See* App., *infra*, at 89a-91a. Finally, it held that Westinghouse's violations were "willful" and accordingly awarded liquidated damages. *Id.* at 97a-100a.

C. The Decision Of The Court Of Appeals.

Westinghouse filed a timely appeal. The Third Circuit affirmed in part, reversed in part, and remanded for further proceedings. App., *infra*, at 1a-45a.

1. *The Holding That There Was Discrimination "Because of Age" Under § 4(a)(1)*

The court of appeals "accept[ed] Westinghouse's contention that the value of early retirement benefits is actuarially greater than or equal to the value of [sev-

erance benefits] plus a deferred pension. . . ." App., *infra*, at 16a. Nonetheless, the court ruled that, by conditioning receipt of severance benefits on ineligibility for or election not to receive immediate retirement benefits, Westinghouse had treated older employees unfavorably because of age. App., *infra*, at 16a-18a. Its reasoning was that older employees had received immediate retirement benefits only, whereas younger employees could receive "both severance benefits and retirement benefits (when they reached the required age)." *Id.* at 17a.

The court next ruled that the denial of severance benefits could not be justified by the fact that they were but one form of post-employment income being provided by an integrated benefit program. App., *infra*, at 19a-21a. The court acknowledged that "the severance pay and pension plans have been negotiated contemporaneously" and that "benefits under both were increased contemporaneously." *Id.* at 26a. But it concluded as a matter of law that "severance pay and pension benefits have distinctly different purposes," that "[p]ension benefits [cannot be] a substitute for severance pay," and that severance pay "is a fringe benefit" that is not an integral part of a retirement and pension package. *Id.* at 20a-21a.

The court further ruled that "[t]he 'additional benefit' provided by the [1982] option plans . . . [did] not eradicate" the age discrimination problem. App., *infra*, at 22a. It reasoned that "an older employee who [was] eligible for early retirement forfeit[ed] already vested benefits by choosing severance pay," while a younger employee who was ineligible for early retirement received severance benefits without forfeiting any retirement benefits. *Id.* The court acknowledged the contrary ruling on this latter point in *Parker v. Federal Nat'l Mortgage Ass'n*, 741 F.2d 975 (7th Cir. 1984), but declined to follow the Seventh Circuit's holding in that case. App., *infra*, at 24a-25a.

2. *The Rejection Of The § 4(f)(2) Defense*

The court next ruled that, despite the well-established bargaining history with respect to the Westinghouse benefit program, Westinghouse's plan was not an "employee benefit plan" within the meaning of § 4(f)(2) of the ADEA. App., *infra*, at 29a.[3] It stated that "[a] plan can be exempt under § 4(f)(2) either as an employee benefit plan that itself satisfies § 4(f)(2), or as an integral component of an employee benefit plan that satisfies § 4(f)(2)." *Id.* at 26a. But, based on its legal conclusion that "severance pay is a fringe benefit for which vested early or selected retirement benefits cannot be a substitute," the court found that the severance and pension provisions in issue were "not integral components of a comprehensive employee benefits scheme." *Id.* The court also held that the challenged provisions could not themselves qualify for § 4(f)(2)'s protection, since they did not "involve age-related cost factors." *Id.* at 27a.

3. *The Decision About Willfulness*

Finally, the court reversed the district court's judgment that Westinghouse had "willfully" violated the ADEA. App., *infra*, at 36a. The court rejected as "clearly erroneous" the findings upon which the district court had based its willfulness judgment. *Id.* at 30a-36a. But it nevertheless remanded to the district court to review the record again and "to reevaluate, in a manner consistent with this opinion, whether Westinghouse willfully violated the ADEA." *Id.* at 35a-36a. Judge Garth dissented, concluding that there was no basis for a finding of willfulness or for a remand. *Id.* at 36a-45a.

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[3] Section 4(f)(2) of the ADEA protects the actions of an employer who "observe[s] the terms of . . . any bona fide employee benefit plan . . . which is not a subterfuge to evade the purposes of [the Act.]" 29 U.S.C. § 623(f)(2). The court of appeals did not address whether Westinghouse's plan was "bona fide" or a "subterfuge."

REASONS FOR GRANTING THE WRIT

I. BY BREAKING WESTINGHOUSE'S POST-EMPLOYMENT BENEFIT PROGRAM INTO SEPARATE COMPONENTS AND ANALYZING THEM IN ISOLATION FROM ONE ANOTHER, THE THIRD CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS, DISRUPTS LONG-ESTABLISHED COMPENSATION AND BENEFIT PRACTICES, AND INJECTS INTO THE ADEA QUALIFICATIONS NOT INTENDED BY CONGRESS.

The court below acknowledged that "the value of early retirement benefits is actuarially greater than or equal to the value of [severance benefits] plus a deferred pension. . . ." App., *infra*, at 16a. Nevertheless, the court concluded that older workers who received these more valuable early retirement benefits had been subject to adverse treatment within the meaning of the ADEA. *Id.* at 16a-18a.

Rather than looking at the program in the integrated manner in which it was negotiated, the court below dissected its key components. It justified this dissection based on its legal premise that pension benefits and severance benefits serve different purposes and cannot be a substitute for each other. This legal premise, however, conflicts with the decisions of other federal courts and inserts a standard in the ADEA not supported by either its plain language or its legislative history. It also conflicts with the well-established compensation practices of the federal government and numerous private employers and unions. If left undisturbed by this Court, the decision below will discourage employers and unions from providing severance benefit programs, which serve an important social purpose by moderating the impact of industrial dislocation. This Court's immediate review is therefore required.

A. The Decision Below Conflicts With Other Federal Courts And Condemns A Compensation Practice That Is Used By The Federal Government, Many Private Employers, And Unions.

1. *The Court's Decision Is In Conflict With Decisions Of Other Circuits.*

Unlike the decision below, other federal courts have rejected ADEA challenges to benefit plans that have integrated pension and severance benefits. The Third Circuit itself recognized (App., *infra*, at 24a-25a) that its decision relating to the option component of Westinghouse's 1982 program is in conflict with the decision of the Seventh Circuit in *Parker v. Federal Nat'l Mortgage Ass'n*, 741 F.2d 975 (1984).

The Third Circuit's decision on this issue also conflicts with the decision of the Fourth Circuit in *Britt v. E.I. DuPont de Nemours & Co.*, 768 F.2d 593 (4th Cir. 1985). That court rejected an ADEA challenge to a program that denied severance benefits to retirement-eligible employees unless they opted to defer receipt of their pension benefits. The Third Circuit attempted to distinguish *Britt* by noting (App., *infra*, at 24a) that *Britt* had purported to distinguish the Third Circuit's earlier decision in *EEOC v. Westinghouse Electric Corp.*, 725 F.2d 211 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984), on the ground that one case involved "severance pay" while the other involved only a "wage substitute" (768 F.2d at 595). However, this is no distinction at all. Both courts were confronted with the question whether linking retirement benefits and non-retirement benefits is prohibited under the ADEA. The two circuits resolved that question very differently and thus are in conflict on the issue presented here.

Similarly, the Third Circuit's decision as to both the pre- and post-1982 programs conflicts with the judgments of other federal courts. *See, e.g., Abenante v. Fulflex, Inc.*, 701 F. Supp. 296 (D.R.I. 1988), *appeal pending*, No. 87-0456-B (1st Cir.); *Khan v. Grotnes Metalforming*

Systems, 679 F. Supp. 751 (N.D. Ill. 1988); *see also Patterson v. Independent School Dist. #709*, 742 F.2d 465, 467 n. 3 (8th Cir. 1984); *EEOC v. Firestone Tire & Rubber Co.*, 650 F. Supp. 1561, 1567-68 (W.D. Tenn. 1987). Indeed, the first district court to apply the decision below explicitly stated that it would have held to the contrary were it not bound to follow the law of the Third Circuit. *See EEOC v. USX Corp.*, No. 87-6044, 1989 U.S. Dist. LEXIS 2943 (E.D. Pa. Mar. 23, 1989).

2. *The Court's Decision Is Contrary To And Will Adversely Impact Long-Established Compensation Practices.*

The rule adopted by the court below, in a nationwide case, does violence to long-standing compensation practices that have been established by a myriad of private and public sector employers and unions. Indeed, many private and public sector employers, including the federal government, have long maintained post-employment benefit programs that link eligibility for severance benefits to ineligibility for or a reduction in pension benefits.

Congress, for example, has expressly proscribed the payment of severance benefits to federal employees who are entitled to immediate civil service retirement benefits. *See* 5 U.S.C. § 5595(a)(2)(iv) (1983).[4] Moreover, surveys indicate that approximately 45 percent of the private collectively-bargained benefit plans imposing restrictions on receipt of benefits deny severance benefits to employees who are eligible for pensions. *See Basic Patterns: Income Maintenance*, Collective Bargaining Negotiations and Contracts (BNA) No. 167, at 53:4 (Apr. 24, 1986). It is well recognized that employers usually in-

[4] Other federal statutes contain similar provisions. *See* 10 U.S.C. § 1186(b)-(c) (1983) and 10 U.S.C. § 1174(e), (h) (1983 and Supp. 1986) (officers and enlisted members eligible for voluntary retirement from active military service not entitled to separation pay); *see also* 14 U.S.C. §§ 286(b), 286a(d), and 327(b) (1983 and Supp. 1986); 33 U.S.C. § 853h(e) (Supp. 1986).

corporate "safeguards" in severance plans that include provisions that "severance pay is not payable if an employee retires on pension." *Industrial Relations Guide* (P-H) ¶ 53,458 (1986). Significantly, such plans exist in a broad range of industries and, in many cases, are the product of collective bargaining.[5]

The decision below will inevitably cause a serious disruption and erosion of these widely-used benefit integration practices. Employers, unions, and plan administrators now face significant liabilities to employees who are the recipients of the more valuable benefits under these integrated benefits packages.

In the face of such unanticipated and costly liabilities, employers, unions, and plan administrators, who establish and manage nationwide plans and thus are concerned with legal certainties, will have no choice but to alter their existing benefit programs to ensure that they can satisfy the arbitrary standard of the Third Circuit. Given the nationwide scope of such programs—as demonstrated in this case—the Third Circuit's ruling has ramifications far beyond that court's geographical bound-

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[5] The EEOC has, for example, already litigated the lawfulness of various kinds of pension severance benefit programs, including collectively bargained programs, in the dairy, rubber, grocery, and steel industries. It also has initiated challenges to, and is currently litigating the lawfulness of, plans in the communications, meat packing, food, automotive, electrical, and petroleum industries. *See EEOC Summary of Age Discrimination Lawsuits Filed in FY 1988*, *Daily Labor Report*, No. 251, at D-1 (Dec. 30, 1988); *Report on the Operations of the Office of General Counsel, Equal Employment Opportunity Commission*, October 1986 through September 1987, at Appendix C (July 11, 1988); *Report on the Operations of the Office of General Counsel, Equal Employment Opportunity Commission*, October 1985 through September 1986, at Appendix A (Mar. 31, 1987). Such litigation creates untenable nationwide uncertainty as to what can be negotiated in post-employment benefit programs and the cost of such programs.

aries and will require the alteration of benefit programs that other courts would otherwise approve.

These alterations will mean (1) fewer severance benefit programs, if employers have to provide to an employee both severance and immediate pension benefits, and (2) a reduction in the number of individuals who will be made eligible for immediate retirement benefits in lieu of existing severance benefit opportunities. If additional funds are spent on providing severance benefits for retirement-eligible employees, the amount of funds available to increase pension benefits will be reduced. Thus, fewer benefits will be paid to those employees who are perceived by employers and unions as having the greatest need.

Finally, the decision below seriously disrupts the collective bargaining process and severely limits the ability of employers and unions to provide comprehensive safety nets for all employees. The Third Circuit's decision is a radical departure from how employers and unions have traditionally negotiated post-employment benefit programs and will bring confusion and uncertainty into the bargaining arena. Indeed, the Third Circuit's decision effectively forecloses an employer and union from tailoring a post-employment benefit package to satisfy the particular needs of the bargaining unit employees. This Court's immediate review is, therefore, necessary to prevent these serious and counterproductive effects.

B. The Decision Below Is Contrary To The Principles And Policies That Guided Congress In Enacting The ADEA.

On the merits, the decision below is plainly wrong. It rests on a legal premise that the distinct nature and purpose of pension and severance benefits precludes their integration. This premise not only ignores the bargaining history of the parties, but more importantly imposes

obligations beyond the specific language of the statute and is contrary to the principles and policies that guided Congress in enacting the ADEA.

The ADEA does not prescribe what benefits should be provided employees or the structure that employers and unions should use in designing benefit programs. To be sure, § 4(a)(1) of the ADEA prohibits an employer from providing less "compensation" to an individual because of his or her age. *See* 29 U.S.C. § 623(a)(1). But it does not prohibit an employer from providing equal or greater "compensation" to an older individual through an integrated package of benefits.

The court below thus erred when it found a violation of the ADEA because Westinghouse provided older employees more valuable retirement benefits instead of less valuable severance benefits. Westinghouse and the unions representing Westinghouse employees were free to determine how much more older employees would receive under the post-employment benefit program.

1. *Congress Did Not Intend To Prohibit The Integration Of Severance Benefits And Pension Benefits.*

There is no reason to read into the language of § 4(a)(1) a limitation or standard that Congress did not itself write. Congress simply did not intend the prohibition against discrimination in "compensation" to preclude the integration of pension and severance benefits. Contrary to the holding of the Third Circuit, the ADEA does not preclude employers and unions from linking pension benefits to severance or other benefits to form an integrated benefit package.

As noted above (*see supra* at 9), Congress has itself expressly proscribed the payment of severance benefits to federal employees who are entitled to immediate civil service retirement benefits. Many of these proscriptions pre-existed the enactment of the ADEA and its extension

to federal employees in 1974. At no time has Congress suggested that the proscriptions on payment of severance benefits to retirement-eligible federal employees constitute adverse treatment on the basis of age. Thus, to interpret § 4(a)(1) to preclude such practices would require the Court "to conclude that Congress itself has repeatedly flouted its own declaration of policy." *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 90 (1973). The Court has said that it will not "lightly find such a breach of faith." *Id.* at 90-91.

Moreover, the legislative history of the ADEA indicates that Congress did not want to disrupt existing employee benefit plans and that it intended generally to address problems of age discrimination in benefit plans in separate legislation. *See United Air Lines v. McMann*, 434 U.S. 192, 195-203 (1977). Congress addressed the issue of employee benefit plans in the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, which was proposed contemporaneously with the ADEA and which was expressly referenced in the ADEA's legislative history. *See* 113 Cong. Rec. 7076 (Mar. 16, 1967), *reprinted in EEOC Legislative History of the Age Discrimination in Employment Act of 1967*, at 71. In enacting ERISA, Congress was "very much aware that many present plans are fully or partly integrated and that elimination of the integration procedures could substantially increase the cost of financing private plans." H.R. Rep. No. 807, 93d Cong., 2d Sess. 69 (1974), *reprinted in 2 Legislative History of the Employee Retirement Income Security Act of 1974* 3115, 3189 (1976).

This Court has also recognized the appropriateness of benefit integration. In *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), the Court held that an employee's pension may be reduced by the amount of any workers' compensation award received. Subsequently, the federal courts have consistently ruled that ERISA permits—and, indeed, encourages—the integration of pen-

sion and severance benefits. *See, e.g., Vintilla v. United States Steel Corp. Plan for Employee Pension Benefits*, 782 F.2d 1033 (3d Cir.), *cert. denied*, 475 U.S. 1141 (1986), *aff'g mem.* 606 F. Supp. 640 (W.D. Pa. 1985); *Spitzler v. New York Post Corp.*, 620 F.2d 19 (2d Cir. 1980).

Congress could not have intended § 4(a)(1) to defeat the policies and practices of the statute that it simultaneously said would govern employee benefit-related matters.

2. *The Court Below Analyzed The Westinghouse Post-Employment Benefit Program Contrary To Well-Established Judicial Principles.*

Because Congress intended to preserve labor-management discretion and business prerogative, this Court has repeatedly held that, absent specific contrary direction, it must assume that Congress intended for issues of employment discrimination to be evaluated in the context of the overall program or policy at issue. *See Johnson v. Transportation Agency*, 480 U.S. 616 (1987) (lawfulness of affirmative action program turns on purpose and effect of plan as a whole); *California Brewers Ass'n v. Bryant*, 444 U.S. 598 (1980) (rule requiring employee to work 45 weeks to be considered "permanent" must be treated as part of "seniority system" of which it was intended to be a part). For this reason, in Title VII cases, the courts of appeals have consistently held that it is improper to isolate the purpose or effect of components of employment programs that were not intended to operate apart from each other. *See, e.g., Women in City Gov't United v. City of New York*, 563 F.2d 537, 540-41 (2d Cir. 1977); *Guse v. J.C. Penney Co.*, 562 F.2d 6, 8 (7th Cir. 1977).

This basic principle of discrimination analysis applies to cases under the ADEA as well. *See Arnold v. United States Postal Serv.*, 863 F.2d 994, 999-1000 (D.C. Cir. 1988) (rejecting challenge to one component of an integrated

transfer policy); *EEOC v. Air Line Pilots Ass'n*, 661 F.2d 90, 93-94 (8th Cir. 1981) (rejecting challenge to one provision of a vacation leave policy). As the D.C. Circuit stated in *Arnold*: "it is neither fair nor reasonable to judge the motives of the [employer] by uncoupling the rule [challenged under the ADEA] from the other aspects of what was clearly intended to be an integrated program." 863 F.2d at 1000.[6]

The manner in which the court below analyzed this case was to dissect the components of a post-employment benefit program that were intended and designed to operate together as an integrated whole. It split off the severance component from the retirement component and then, averting its gaze from favorable treatment of older employees and looking at the severance benefits in isolation, characterized the severance component as discriminatory against older employees. This is unrealistic and inconsistent with the above-stated principles.

The decision of the court below, which wrenches the severance benefit provision from the benefit program of which it was intended to be an inseparable part, conflicts with these judicially accepted principles of discrimination analysis and cannot be allowed to stand.

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[6] Importantly, the Department of Justice filed the appeal in the *Arnold* case on behalf of the Postal Service, with the authorization of the Solicitor General. The Justice Department urged the D.C. Circuit to rule, as it did, that an integrated employment policy may not be "balkanized" into its constituent parts in order to establish a claim of disparate impact or disparate treatment. The EEOC's position in the court below is thus inconsistent with the position that the Solicitor General has authorized the Justice Department to take on behalf of an agency of the United States. For the Court's convenience, petitioner has reprinted the relevant portions of the Justice Department's *Arnold* brief in the Appendix to this petition. App., *infra*, at 104a-119a.

II. THE THIRD CIRCUIT'S DECISION THAT ONLY PLANS REFLECTING AGE-RELATED COST FACTORS QUALIFY FOR PROTECTION UNDER § 4(f)(2) OF THE ADEA CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AND IMPOSES A STANDARD NOT INTENDED BY CONGRESS.

The second question that this petition presents concerns whether § 4(f)(2) of the ADEA—which makes it lawful for an employer to observe the terms of "any bona fide employee benefit plan[,] such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes" of the ADEA (29 U.S.C. § 623(f)(2))—protects only those plans that reflect age-related cost factors. This question, which is also raised in *Public Employees Retirement System v. Betts*, No. 88-389 (U.S. argued Mar. 28, 1989), plainly warrants this Court's immediate review.

The courts of appeals are in direct conflict concerning whether § 4(f)(2) of the ADEA protects only those plans that reflect age-related cost factors. The Sixth Circuit, like the court below (App., *infra*, at 27a-28a), has concluded that § 4(f)(2)'s coverage extends only to those plans where the cost of providing the benefit in issue increases with age. *See Betts v. Hamilton County Bd. of Mental Retardation*, 848 F.2d 692, 694 (6th Cir. 1988), *prob. juris. noted*, No. 88-389 (U.S. argued Mar. 28, 1989); *see also Karlen v. City Colleges*, 837 F.2d 314, 319 (7th Cir.), *cert. denied*, 108 S. Ct. 2038 (1988).

The Fifth Circuit, in contrast, has twice declined to limit § 4(f)(2) to plans that have such age-related cost justifications. *See Brennan v. Taft Broadcasting Co.*, 500 F.2d 212, 216-17 (5th Cir. 1974) (profit-sharing retirement plan); *Alford v. City of Lubbock*, 664 F.2d 1263, 1268-70 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982) (defined contribution pension plan). The Second Circuit agrees. *See Cipriano v. Board of Educ.*, 785 F.2d

51, 54-55 (2d Cir. 1986) (age-related cost factors do not determine whether a plan is a "bona fide employee benefit plan" within the meaning of § 4(f)(2)). The Ninth and Tenth Circuits have also held that an age-related cost justification is not the exclusive means of establishing that the § 4(f)(2) defense applies. *See EEOC v. County of Orange*, 837 F.2d 420, 422 (9th Cir. 1988) (age-related cost justification not necessary for plan that pre-dates passage of the ADEA); *EEOC v. Cargill, Inc.*, 855 F.2d 682, 686 (10th Cir. 1988) (same).

This Court acknowledged the significance of this inter-circuit conflict, and the importance of the issue that underlies it, when it noted probable jurisdiction in *Betts*. The age-related cost justification theory on which the Sixth Circuit relied in *Betts* is likewise central to the Third Circuit's decision to deny § 4(f)(2)'s protection to the challenged components of Westinghouse's benefit program. To be sure, the instant case involves pension and severance benefits rather than disability and age and service retirement benefits (as in *Betts*). But the legal issue that the case presents—whether § 4(f)(2) applies only to plans that reflect age-related cost factors—is no different from the question presented in *Betts*, and certainly no less important.[7]

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[7] While the court below suggested (App., *infra*, at 26a) that a plan could qualify for § 4(f)(2)'s protection even if it did not itself reflect age-related cost factors, it made clear that it could do so only if it was an integral part of a plan that had such age-related cost factors. Thus, the legal question presented in *Betts* is common to both grounds of the decision below.

In any event, in analyzing this issue, the court below simply repeated its assertion that severance and pension benefits cannot, as a matter of law, be integrated. App., *infra*, at 26a-27a. Indeed, it did so while holding that even Westinghouse's "pension plans are not exempt under 29 U.S.C. § 623(f)(2)" (*id.* at 29a), as well as violate § 4(a)(1). But this assertion and holding find no support in the practices of the parties or the statute; they conflict with the decisions of other courts. *See, e.g., Patterson v. Independent School Dist. #709*, 742 F.2d 465 (8th Cir. 1984).

The Court may, of course, resolve in *Betts* the question whether § 4(f)(2) protects only those types of plans that reflect age-related cost factors. If so, the Court should dispose of that aspect of this petition as is appropriate in light of its decision in *Betts*. If not, however, plenary review of this issue is essential: as explained in detail in the various briefs filed in *Betts*, most of the nation's established benefit programs cannot justify their age-related benefit variances by reference only to age-related cost factors. This Court's review is necessary both to resolve the confusion that now exists concerning whether § 4(f)(2) protects these programs and to restore the certainty that is critical to these programs' effective operation.[8]

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[8] The Third Circuit's characterization of severance benefits as "fringe benefit[s]" (App., *infra*, at 26a) does not remove them from § 4(f)(2)'s protection. First, this Court has recognized that severance benefit plans are employee benefit plans under ERISA. *See Massachusetts v. Morash*, 57 U.S.L.W. 4429 (U.S. Apr. 18, 1989); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 107 S. Ct. 2211, 2220-21 (1987); *Roberts v. Burlington Industries*, 477 U.S. 901 (1986), *aff'g mem. sub nom. Holland v. Burlington Industries*, 772 F.2d 1140, 1145 (4th Cir. 1985); *Roberts v. Burlington Industries*, 477 U.S. 901 (1986), *aff'g mem. sub nom. Gilbert v. Burlington Industries*, 765 F.2d 320, 325 (2d Cir. 1985). Second, nothing in § 4(f)(2) or its legislative history confines the term "employee benefit plan" to a "retirement, pension, or insurance" plan. *See Brennan v. Taft Broadcasting Co.*, 500 F.2d 212, 216-17 (5th Cir. 1974) (profit-sharing plan). The term "any" in § 4(f)(2) makes the exemption comprehensive in scope (*see Harrison v. PPG Industries*, 446 U.S. 578, 587-89 (1980)); the phrase "bona fide" means only that a plan "'exists and pays benefits'" (*see United Air Lines v. McMann*, 434 U.S. 192, 194 (1977)); the phrase "employee benefit" refers to virtually any form of compensation that is in a form other than direct wages and is paid in whole or in part by an employer—i.e., to any "fringe benefit" (*Fundamentals of Employee Benefit Programs* 2 (Employee Benefit Research Institute, 3d ed. 1987)); and the term "plan" refers to severance plans, similar to the one presented in this case, provided pursuant to an on-going administrative benefit program (*see Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. at 2216-21).

III. THE THIRD CIRCUIT'S DECISION THAT WESTINGHOUSE MAY BE DEEMED TO HAVE "WILLFULLY" VIOLATED THE ADEA IS INCONSISTENT WITH THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

In *Trans World Airlines v. Thurston*, 469 U.S. 111, 126 (1985), this Court held that an employer's ADEA violation is "willful" only if the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." Under this standard, an employer who acts "reasonably and in good faith" in determining its legal obligations does not act "willfully" for purposes of the ADEA. 469 U.S. at 129. Indeed, as this Court made clear in *McLaughlin v. Richland Shoe Co.*, 108 S. Ct. 1677, 1682 n. 13 (1988), an employer does not act "willfully" even if it "acts unreasonably, but not recklessly, in determining its legal obligation."

Accordingly, the courts of appeals have concluded that, where other courts have upheld the legality of a challenged practice, a "willful" violation cannot, as a matter of law, be found; in such circumstances, it is not possible to find that the employer knew that, or did not care whether, its actions violated the ADEA. *See Whitfield v. City of Knoxville*, 756 F.2d 455, 464 (6th Cir. 1985); *EEOC v. Madison Community Unit School Dist. No. 12*, 818 F.2d 577, 585-86 (7th Cir. 1987); *see also EEOC v. Westinghouse Electric Corp.*, 646 F. Supp. 555, 562-63 (D.N.J. 1986), *appeal pending*, No. 87-5174 (3d Cir. argued Oct. 20, 1987). The Third Circuit's decision cannot be reconciled with these decisions.

As explained above, the federal courts are divided concerning whether, as Westinghouse argued to the courts below, § 4(a)(1) of the ADEA allows an employer to maintain an integrated benefits program that provides the greater of retirement or severance (and deferred pension) benefits to terminated employees. *See supra*, at 8-9. They are also divided concerning whether, as West-

inghouse argued to the courts below, § 4(f)(2) of the ADEA protects such a program, even though neither it nor its components reflect age-related cost factors. *See supra*, at 16-17.

Indeed, the court of appeals agreed with Westinghouse that it had not acted contrary to existing legal authority and acknowledged that Westinghouse had initially persuaded a district court that § 4(f)(2) protected its plans. *See EEOC v. Westinghouse Electric Corp.*, 577 F. Supp. 1029 (D.N.J. 1982), *rev'd*, 725 F.2d 211 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984), *on remand*, 646 F. Supp. 555 (D.N.J. 1986), *appeal pending*, No. 87-5174 (3d Cir. argued Oct. 20, 1987). While the Third Circuit reversed that decision, it did so on the basis of the very theory—the age-related cost justification theory—that at least four Justices have agreed in *Betts* is sufficiently controversial to merit this Court's review. In these circumstances, it is legally impossible to find that Westinghouse knew that, or did not care whether, its actions violated the ADEA.

The contrary judgment of the court of appeals, reflected in its order remanding this issue to the district court for further proceedings, rests on the view that, notwithstanding the unsettled state of the law, an employer may still be held in "willful" violation of the ADEA for maintaining these benefit programs. *See* App., *infra*, at 29a-36a. This view, however, is inconsistent with the view of this Court and other federal courts—to wit, that an employer does not knowingly or recklessly violate the ADEA when, after considering its legal obligations, it refuses to capitulate to rulings with which not all informed members of the legal community have agreed. *See McLaughlin v. Richland Shoe Co.*, 108 S. Ct. at 1682; *Whitfield v. City of Knoxville*, 756 F.2d at 464.

Because the court of appeals' decision on willfulness so conflicts with decisions of this Court and other courts of appeals, review should extend to this as well as the other

two questions presented. Indeed, the willfulness decision is so patently wrong that, absent plenary review of this case, the Court should summarily reverse this portion of the judgment below in order to restore clarity and uniformity to the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 1989

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-1226

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

v.

WESTINGHOUSE ELECTRIC CORPORATION
Appellant

On Appeal from the United States District
Court for the Eastern District
of Pennsylvania
(D.C. Civil Action Nos. 83-5457 and 84-4799)

Argued October 20, 1987
Before: HIGGINBOTHAM, SCIRICA and
GARTH, *Circuit Judges*

(Filed February 2, 1989)

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OPINION OF THE COURT

SCIRICA, *Circuit Judge.*

This appeal arises from an action brought by the Equal Employment Opportunity Commission against Westinghouse Electric Corporation, based on the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634 (1982). The EEOC alleges that Westinghouse's 1979

and 1982 pension and severance pay policies,[1] discriminate based on age. After a bench trial, the district court found that Westinghouse's plans discriminate based on age, and that Westinghouse willfully violated the ADEA. Westinghouse appeals from that decision.

In our review, we must determine whether Westinghouse's 1979 pension and severance pay plans, denying severance pay to retirement-eligible employees who are terminated or laid off, violate § 4(a)(1) of the ADEA, 29 U.S.C. § 623(a)(1). We must also decide whether Westinghouse's 1982 pension and severance pay plans, which allow retirement-eligible, involuntarily terminated employees to elect either severance pay or retirement benefits, but not both, violate 29 U.S.C. § 623(a)(1). We hold that under both plans, retirement-eligible employees are treated less favorably than their younger counterparts with respect to their ability to receive severance pay. Because retirement eligibility under the Westinghouse plans is inseparably linked with age, the discriminatory treatment is based on age. Therefore, both the 1979 and 1982 plans violate the ADEA.[2]

We must also address Westinghouse's claim that its severance pay plans are exempt from ADEA coverage

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[1] The term severance pay plan refers to the 1979 Layoff and Income Benefits Plan ("LIB") and the 1982 Employee Security & Protection Plan ("ES&P"), which cover non-management employees; and to the Management Separation Allowance Program ("MSA"), which covers management personnel.

Westinghouse revised its pension and LIB plans in 1982 ("1982 plans"), and its MSA plan in 1985, to provide employees with an option to receive either severance pay or retirement benefits.

[2] Westinghouse contends that a *prima facie* case of age discrimination was not established. That issue, however, is "subsumed on appeal into whether the plaintiff has sustained . . . [its] ultimate burden of proving that age was a determinative factor in the plaintiff's termination." *Dreyer v. Arco Chemical Co., Div. of Atl. Richfield*, 801 F.2d 651, 654 (3d Cir. 1986). *See also Berndt v. Kaiser Aluminum & Chemical Sales, Inc.*, 789 F.2d 253, 257 (3d Cir. 1986).

under § 4(f)(2), 29 U.S.C. § 623(f)(2). Because those plans are not part of an integrated employee benefit scheme that satisfies § 4(f)(2) and do not involve age-related cost factors, we reject Westinghouse's § 4(f)(2) defense.

Finally, we must decide whether the district court erred in concluding that Westinghouse willfully violated the ADEA. We will remand to the district court to re-evaluate willfulness because: (1) some of the factors relied upon by the district court do not support its finding of willfulness, and (2) the court did not consider separately the 1979 plans and the 1982 plans when making its determination on willfulness.

I. *Proceedings*

In November, 1982, Charles Slackway, age 62, a former employee at Westinghouse's Lester, Pennsylvania facility, filed a charge of age discrimination with the EEOC. Slackway claimed that unlike younger employees, he was denied severance pay when he was laid off. *See* J.App. at 1952. In June, 1983, the EEOC issued a letter of violation to Westinghouse, concluding that Westinghouse discriminated against Slackway (and others named and/or yet to be named) in violation of 29 U.S.C. § 623(a)(1). The letter stated that the Commission, in accordance with its statutory mandate,[3] sought voluntary compliance with the ADEA through informal methods of conciliation. J.App. at 1971.[4]

Evidently, efforts at conciliation proved fruitless and the EEOC filed its original complaint on November 10, 1983, pursuant to 29 U.S.C. § 626(b). The EEOC alleged

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[3] *See* 29 U.S.C. § 626(b).

[4] Before instituting this lawsuit, the EEOC issued four more letters of violation to Westinghouse, each time stating EEOC's continued interest in conciliation, but indicating that if Westinghouse continued to ignore its efforts, the case would be referred to the legal unit for possible litigation. J.App. at 1974-81.

that Westinghouse willfully engaged in unlawful employment practices at its Lester, Pennsylvania facility, in violation of 29 U.S.C. § 623(a)(1), by failing to provide Layoff and Income Benefits (LIB) to employees age sixty or older who were terminated or laid off and were eligible for, and/or had received, early retirement benefits under Westinghouse's pension plan. The complaint identified thirty-five aggrieved employees and included all others similarly situated. J.App. at 15.

EEOC filed its first amended complaint on August 23, 1984, expanding the action to include Westinghouse's Concordville, Pennsylvania facility. That complaint identified 126 aggrieved employees, included others yet to be named, and contained allegations of additional unlawful employment practices: (1) denying LIB to employees laid off prior to July, 1982 who were eligible for any type of retirement benefit; (2) giving employees who were laid-off after July, 1982, the option of selecting either LIB or retirement, but not both; (3) forcing laid-off employees to retire prior to age seventy because LIB was not available; (4) denying early retirement to laid-off employees who chose LIB; (5) denying recall work to employees who were laid off and forced to retire; and (6) giving lower retirement benefits to laid-off employees who were not eligible for retirement because of their age at the time of the layoff, but who later became qualified for retirement benefits.

In October, 1984, the EEOC filed a second amended complaint, expanding its prior claims by alleging that Westinghouse engaged in those unlawful employment practices in all of its facilities nationwide. The employment practices were alleged to have begun at least as early as 1980, and to have continued through the time of filing of each of the complaints. The EEOC also filed a new collateral complaint containing the same nationwide allegations. The district court ordered that the cases be consolidated and tried jointly.

Following trial, the district court issued its opinion,[5] in which it held: (1) that Westinghouse's 1979 employee pension, and severance pay plans, which denied severance pay to employees who take retirement, discriminated based on age, in violation of 29 U.S.C. § 623(a)(1); (2) that Westinghouse's 1982 employee pension and severance pay plans, which provide laid-off employees with an option between severance pay and pension benefits, discriminate based on age in violation of 29 U.S.C. § 623(a)(1); and (3) that Westinghouse willfully violated the ADEA.[6]

With respect to both plans, the district court found that because receipt of severance pay is conditioned on non-retirement status, laid-off workers are treated differently on the basis of age. The court stated that "(a)ge and retirement are, in fact, so closely linked that a criterion based on one is a criterion based on the other." 632 F. Supp. at 367. In evaluating Westinghouse's plans, the district court did not consider separately the 1979 and 1982 plans. However, the court found that the option provided by the 1982 plans does not give employees a practical choice, because selection of LIB instead of retirement requires forfeiture of insurance and medical benefits. Therefore, the court concluded, for all practical purposes there is no difference between the 1982 plans and the 1979 plans. In any event, the court held that provid-

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[5] *EEOC v. Westinghouse Elec. Corp.*, 632 F. Supp. 343 (E.D. Pa. 1986).

[6] The EEOC's charges implicated several other Westinghouse plans and practices: (1) Advanced Retirement Plan I & II; (2) an "impact number" process by which special benefits are awarded to certain employees who are laid off because of product-line relocation, job movement or location shutdown; (3) limiting retirement benefits to employees who are actually eligible when laid off; and (4) limiting death-prior-to-retirement benefits to spouses of deceased employees who were actually eligible for retirement benefits at the time of death. *See* 632 F. Supp. at 351. The district court held that these plans and practices do not violate the ADEA because they were bona fide pension and seniority arrangements. *Id.* at 369-71. Those rulings are not challenged on appeal.

ing an option does not cure the violation because older employees still cannot receive both pension and severance pay. The option is merely a "sham to prolong the litigation of this issue." *Id.* at 366 n.12.

The district court also rejected Westinghouse's assertion that its programs have a legitimate, non-discriminatory purpose. Westinghouse's justification was a purported corporate policy against double-dipping; that is, it would not provide more than one type of benefit to a laid-off employee in order to insure that all laid-off employees received some type of post-employment benefit. The court termed this argument inconsistent, noting that under the various severance pay plans, some employees can receive more than one type of post-employment benefit. For example, a laid-off employee age fifty-nine with more than ten, but less than thirty years of service, can receive LIB until age sixty, at which point he can take early retirement. *See* 1979 LIB plan at 4; 1982 ES&P plan at 7 (J.App. at 1806, 1817). Furthermore, the court held, the unstated premise of the no double-dipping rationale—that severance pay and pension benefits are fungible—is incorrect. Severance pay is a short-term fringe benefit that allows a laid-off employee to cope with the layoff and to seek new employment. Pension benefits, on the other hand, provide for long-term retirement. The two have distinctly different purposes: "Pension benefits are not a substitute for severance pay." 632 F. Supp. at 367.

Next, the district court rejected Westinghouse's defense under § 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2), which exempts from the ADEA's coverage bona fide employee benefit plans that are not a subterfuge to evade the purposes of the Act. The court found that severance pay is not a bona fide employee benefit plan because it is a fringe benefit and not an integral part of Westinghouse's pension plans. Alternatively, the court held that even if severance pay is part of a bona fide employee benefit plan, Westinghouse did not establish that its plan

was not a subterfuge to evade the purposes of the ADEA, as required by 29 U.S.C. § 623(f)(2). Although Westinghouse's severance pay plan was in existence prior to the enactment of the ADEA, the court noted that since passage of the ADEA, Westinghouse's plans have undergone negotiation, adjustment and reaffirmation. It found that reaffirmation of prior discriminatory practices amounts to evasion of the ADEA and is a subterfuge to evade its purposes. 632 F. Supp. at 368.

Finally, the district court held that Westinghouse willfully violated the ADEA. The court said that Westinghouse: (1) stubbornly resisted compliance with the ADEA, (2) ignored judicial invalidations of policies similar to its own, (3) belatedly invented a corporate policy against double-dipping to justify its unwillingness to comply, and (4) made a "good faith" argument—that the 1979 plan was designed before enactment of the ADEA, and that the 1982 plan was designed in reliance on statements made by EEOC counsel in another litigation[7]—that was transparent and incredible.

In order to decide the issues presented in this case, we must examine Westinghouse's pension and severance pay plans.[8]

II. *The plans*

A. *1979 pension plan*

The 1979 version of Westinghouse's pension plan provided for "normal," "deferred," "early," or "selected" re-

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[7] In 1980, the EEOC filed suit against Westinghouse in the District of New Jersey, alleging that Westinghouse violated 29 U.S.C. § 623(a) by failing to provide LIB to employees eligible for early retirement under the Westinghouse pension plan. *See EEOC v. Westinghouse Elec. Corp.*, 577 F. Supp. 1029 (D.N.J. 1982), *rev'd*, 725 F.2d 211 (3d Cir.), *cert. denied*, 469 U.S. 820 (1984).

[8] Only those Westinghouse post-employment policies that are implicated in this appeal are discussed. For a description of Westinghouse policies that were challenged at trial but not on appeal, *see* 632 F. Supp. at 354-56.

tirement. Normal retirement occurred at age sixty-five, after five years of service. However, an eligible employee could defer retirement until age seventy. Also, certain employees could take early retirement before age sixty-five (normal retirement age). Depending on the years of service, an employee could retire at specified ages between fifty and sixty. There were four "early retirement" subcategories, three of which concerned early retirement after layoff. Those three subcategories provided that a laid-off employee who had received lump-sum severance pay was ineligible for early retirement. *See* J. App. at 1598-99.

Selected retirement under the 1979 plan contained two subcategories. Under the first subcategory, an employee with at least thirty years of service could choose selected retirement when he was between fifty-eight and sixty-five years of age. The second subcategory concerned selected retirement after layoff. An employee laid off because of a location closedown, or a job movement or product-line relocation after August 1, 1979, was eligible for selected retirement if he was between fifty and sixty years of age, had at least thirty years of service, and did not receive lump-sum severance pay.

B. *LIB: 1979 separation benefits plan for non-management personnel*

After layoff, certain non-management employees could receive separation benefits termed "Layoff and Income Benefits" ("LIB"). Eligibility for LIB was determined by two or more full years of service and, most important for our inquiry, by non-entitlement to early or selected retirement benefits under the Westinghouse pension plan.[9] *See* Article VI, § 1 (a) of 1979 LIB plan (J.App. at 1302, 1805).

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[9] Employees who are eligible for early or selected retirement are referred to as "retirement-eligible employees."

An eligible employee could receive LIB in one of several forms. If management thought that the layoff would exceed six months, the employee could receive the maximum allowable sum in a lump-sum payment. An employee who chose a lump-sum payment permanently severed his relationship with Westinghouse and relinquished any recall rights or credits for years of service with the company (with the exception of his rights, if any, under the pension plan). J.App. at 1303, 1304; J.App. at 1805, 1806. Alternatively, an eligible employee who wanted to retain recall rights and service credits (*see* J.App. at 1304; J.App. at 1806) could apply for weekly benefits in lieu of a lump-sum payment. Weekly payments, including any state or federal unemployment compensation benefits received by the employee, would be sixty percent of the employee's "week's pay." *See* J.App. at 1304; J.App. at 1806.

The third manner of payment of LIB occurred when an eligible employee had been on layoff for one year and Westinghouse had not offered him reemployment. In that situation, the balance of the maximum sum would be paid to the employee in a lump sum, provided he was not laid off within one year of the time he would have become eligible for early retirement under the pension plan. In the latter instance, the employee would receive weekly payments until age sixty, when he would receive his early retirement pension. Payments made under the third option did not affect recall rights or service credit. J.App. at 1304; J.App. at 1806.

C. *Pre-1985 separation benefits for management personnel*

Separation benefits for management personnel paralleled the structure of LIB. These benefits are provided for in the Westinghouse "Management Separation Allowance Plan" ("MSA"), which became effective February, 1975. *See* J.App. at 1850-72. The purpose of MSA, like

LIB, was to provide financial assistance to laid-off employees during the period immediately following layoff. The MSA plan provided monetary benefits calculated on the basis of the years of credited service, the basic monthly salary at time of separation, and the reason for separation of the employee. Management employees who at the time of separation (or upon attaining age sixty) were eligible for either early or selected retirement were not eligible for MSA benefits. J.App. at 1858, 1862.

MSA benefits could be received on a monthly basis, or in a lump-sum payment. Lump-sum payments, however, had to be specifically requested by the employee, and would be made in the discretion of management. J.App. at 1864. If the employee was granted lump-sum payment, then life insurance, hospitalization, surgical, maternity, and major medical protection terminated on the last day worked.[10]

D. *The 1982 pension plan*

In July, 1982, Westinghouse revised its pension plan. The revised plan retained four categories of retirement: "normal," "deferred," "early," and "selected." Normal retirement, as under the 1979 plan, is at age sixty-five. An employee could defer retirement for any length of time until age seventy. *See* §§ 2.A. & 2.B., 1982 pension plan (J.App. at 1519).

Early retirement remained possible under any of the four subcategories that existed under the 1979 pension plan. Depending on the employee's years of service, he could retire at specified ages between fifty and sixty. A condition of early retirement under each subcategory was that the employee not have elected to receive benefits

[10] If the employee chose to receive monthly payments, these other benefits would continue for the duration of the monthly payments, or for a period of twelve months, whichever was shorter.

under the Westinghouse separation benefits plan.[11] *See* § 2.C., 1982 pension plan (J.App. at 1549-50).

Selected retirement remained possible for an employee between fifty and sixty-five years of age, depending on years of service to the company. However, the employee must not have elected benefits under the company's separation benefits plan. *See id.* at § 2.D. (J.App. at 1550).

E. *ES&P plan—the 1982 separation benefits plan for non-management employees*

In 1982, Westinghouse also revised its separation benefits plan for non-management employees and renamed it the "Employee Security and Protection Plan" ("ES&P"). *See* J.App. at 1813. With some minor changes, the plan's structure is essentially the same as the 1979 LIB plan. An employee with at least two years of service who is laid off as the result of a location closedown is eligible to receive a lump-sum payment determined by his salary and length of service. *See* 1982 ES&P plan at 2 (J.App. at 1815). If the employee is laid off due to job movement or product-line relocation, he may receive a lump-sum payment if he has at least fifteen years of service. No matter what the reason for the layoff, the employee may choose to receive weekly payments instead of a lump-sum payment. *See id.* at 2, 4-6 (J.App. at 1815, 1816-17).

Unlike the 1979 LIB plan, the ES&P plan does not preclude retirement-eligible employees from receiving separation benefits; it gives them an option. If a retirement-eligible employee is laid off because of location closedown, job movement or product-line relocation, he may elect either early retirement, or lump-sum payment of separation benefits. Employees who elect to retire are eligible to receive several pension and insurance benefits not

[11] The LIB plan was revised in July, 1982 and was renamed the "Employee Security and Protection Plan" ("ES&P").

available to those who select ES&P benefits: a pension payable for life; a supplemental monthly payment for each year of credited service until eligible for Social Security payments; an opportunity to provide continued benefits to a spouse or other person in the event of death; continuation of life insurance; continuation of medical coverage until eligible for Medicare; and continuation of dependent insurance. *See id.* at 3 (J.App. at 1815-16).

F. *Post-1985 MSA*

For purposes of this appeal, the only relevant change in the MSA plan occurred in September, 1985: a retirement-eligible management employee who is laid off may now choose either MSA or pension benefits. *See* J. App. at 742-43, 751 (T. Sept. 6 at 121-22, 140). Prior to that date, laid-off management employees were ineligible for MSA benefits if they were eligible for either early or selected retirement benefits. *See supra*, description of MSA plan, effective February, 1975.

III. *Discussion*

At the outset, we must determine whether the district court abused its discretion under Fed. R. Civ. P. 15 by permitting the EEOC to twice amend its original complaint. *See Lewis v. Curtis*, 671 F.2d 779, 783 (3d Cir.), *cert. denied*, 459 U.S. 880 (1982); *Heyl & Patterson Int'l. Inc. v. F.D. Rich Housing, Inc.*, 663 F.2d 419, 425 (3d Cir.), *cert. denied*, 455 U.S. 1018 (1982) (grant of leave to amend will be reversed only for abuse of discretion). Those amendments expanded the action to include employment practices at Westinghouse's facilities nationwide, and to increase the list of aggrieved employees on whose behalf relief was sought. Westinghouse contends that it did not have fair notice of the additional claims or the expansion of the action. Furthermore, Westinghouse argues that it was substantially prejudiced

because the amendments rendered its initial discovery efforts inadequate, disrupted its litigation strategy, and caused a loss of opportunity to investigate and mitigate its liabilities.

We hold that the district court properly allowed the amendments. Claims asserted in amended pleadings relate back to the date of the original pleading if they "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. . . ." Fed. R. Civ. P. 15(c). The additional claims presented in the first amended complaint, like those in the original complaint, concern Westinghouse's denial of severance pay to retirement-eligible persons. The second amended complaint raised no additional substantive claims; it merely expanded the action to include employment practices in Westinghouse's facilities nationwide. The factual basis for the amended claims was identical.

Because the employment practices complained of in the original and first amended complaints were in effect at all of Westinghouse's facilities nationwide, Westinghouse was not deprived of fair notice. *See Coventry v. United States Steel Corp.*, 856 F.2d 514, 519 (3d Cir. 1988). *See also* 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1501 at 526-27 (1971 & Supp. 1987) (When the original complaint notifies defendant of conduct upon which plaintiff bases his claim, it is "reasonable to assume that defendant has knowledge of any claim plaintiff might assert . . . arising out of the event in dispute."). Furthermore, increasing the list of aggrieved employees did not prejudice Westinghouse because it had notice that any employee adversely affected by its severance pay policies was a potential plaintiff. *See* Wright & Miller, § 1501 at 524.

Under these circumstances, the diminution of Westinghouse's initial discovery efforts does not constitute undue prejudice that would preclude amendment. *Cf. Cornell*

& Co. v. Occupational Safety & Health Review Comm'n, 573 F.2d 820, 825 (3d Cir. 1978) (amendment of complaint to allege safety-belt violation when original complaint alleged improper flooring on construction structure changed legal and factual matters in dispute, resulting in undue prejudice to non-moving party). Similarly, the fact that Westinghouse may have had to alter its litigation strategy as a result of the amendments is not dispositive. *See* 6 Wright & Miller § 1497, at 499-592.

Standard of Review

Our review of the district court's choice, interpretation or application of legal precepts is plenary. *In re McKeesport Steel Castings Co.*, 799 F.2d 91, 93 (3d Cir. 1986) (quoting *Universal Minerals v. C.A. Hughes & Co.*, 669 F.2d 98, 101-02 (3d Cir. 1981); *Killeen v. Travelers Ins. Co.*, 721 F.2d 87, 89 (3d Cir. 1983). We apply this standard to whether Westinghouse's post-employment benefits plans violate the ADEA, and if so, whether under 29 U.S.C. § 623(f)(2) they are exempt from coverage. We review under the clearly erroneous standard factual findings that underlie the district court's conclusions. Fed. R. Civ. P. 52(a); *see also Pullman-Standard v. Swint*, 456 U.S. 273, 285-90 (1982). Similarly, we apply the clearly erroneous standard to the facts relied upon by the district court in finding willfulness.

A. *Westinghouse's 1979 post-employment policies*

Westinghouse maintains that its 1979 post-employment policies did not violate the ADEA because they did not treat employees in the protected age group [12] less favorably than non-protected employees. Indeed, Westinghouse

[12] The ADEA protects individuals between forty and seventy years of age. *See* 29 U.S.C. § 631(a). For clarity, we refer to those individuals as "older" employees. Employees not covered by the ADEA are referred to as "younger" employees.

contends that it treated older employees more favorably than younger employees because the value of early retirement benefits (eligibility for which precluded receipt of LIB or MSA benefits) was greater than or at least equal to the value of LIB or MSA benefits plus a deferred pension.[13] In addition, Westinghouse argues that even if less-favorable treatment occurred, it was not based on age. It contends that pension eligibility, on which the denial of LIB and MSA to older employees was based, is a reasonable factor other than age and therefore its policies did not violate the ADEA. Further, Westinghouse argues that the pension, LIB and MSA plans formed a comprehensive and integrated benefits program under which no employee receives more than one type of post-employment benefit, and therefore were lawful means of ensuring that the greatest possible number of employees received at least some type of post-employment benefit.

We hold that the district court's finding that Westinghouse's denial of severance pay to employees who retire was based on age, is not clearly erroneous. Under Westinghouse's 1979 plans, older employees were treated less favorably than younger employees. Even if we accept Westinghouse's contention that the value of early retirement benefits is actuarially greater than or equal to the value of LIB or MSA plus a deferred pension, our conclusion is the same. The 1979 pension and severance pay plans denied severance pay to laid-off employees who were eligible for early or selected retirement.[14] Those

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[13] Westinghouse bases its argument that the value of pension benefits is greater than or equal to the value of LIB or MSA plus a deferred pension on the trial testimony of, and oral report by, Westinghouse's actuarial specialist. *See* J.App. at 999-1012; J.App. at 2088-92.

[14] Under the 1979 pension plans, employees who received lump-sum LIB or MSA payments were precluded from early or selected retirement. Apparently, those who received weekly LIB or monthly

employees, however, had vested rights to their retirement benefits independent of Westinghouse's policy on severance pay. It is therefore inappropriate to characterize retirement benefits as a more valuable substitute for severance pay. Any right to severance pay was in addition to, not a part of, the preexisting vested right to retirement benefits. Further, younger employees not in the protected age group, having the same length of service and being laid off for the same reason as older employees, were able to receive both severance pay and retirement benefits (when they reached the required age).[15] Therefore, older employees were treated less favorably than younger employees despite the fact that the actuarial value of early retirement benefits may be equal to or greater than the actuarial value of LIB or MSA.[16] *See*

MSA were not. This distinction is irrelevant, though, because the LIB and MSA plans did not allow retirement eligibles to receive either weekly or lump-sum severance pay.

[15] Under Westinghouse's plans, some older employees could have received both deferred retirement benefits and severance pay—for example, an employee who was laid off between the ages of forty and fifty, or one over fifty who did not have the requisite years of service. That fact is irrelevant. The ADEA protects individual rather than group rights; it is unlawful for an employer to "discriminate against any *individual* . . . because of such individual's age." 29 U.S.C. § 623(a)(1) (emphasis added). *See also Connecticut v. Teal*, 457 U.S. 440, 453-55 (1982) (recognizing that under a similar provision in Title VII, "an employer . . . [cannot] discriminate against some employees . . . merely because he favorably treats other members of the employees' group." *Id.* at 455). Therefore a violation can occur despite the fact that some members of the group were treated as favorably as non-protected employees.

[16] Even if it were somehow relevant whether the value of early retirement benefits exceeds the value of LIB or MSA plus a deferred pension, Westinghouse's expert's conclusions are not probative in this case. Those conclusions were based on an examination of the value of early retirement benefits to employees as a class and not on an individual basis. J.App. at 1001; J.App. at 2089.

As discussed *supra* note 15, however, the ADEA protects individual rights. Westinghouse's expert stated that actuarial mathematics is

EEOC v. Borden's, Inc., 724 F.2d 1390, 1393-94 (9th Cir. 1984).

Our inquiry does not end here, however. To establish a violation of the ADEA, the EEOC must demonstrate not only that older employees were treated less favorably than younger employees, but also that the less favorable treatment was based on age. 29 U.S.C. § 623(a)(1); *see also Smithers v. Bailar*, 629 F.2d 892, 897-98 (3d Cir. 1980) (plaintiff must show that age made a difference in the complained of decision). It is a defense to a charge of age discrimination under the ADEA that the differentiation complained of is based on reasonable factors other than age. *See* 29 U.S.C. § 623(f)(1).

Westinghouse contends that its denial of LIB or MSA benefits to employees eligible for early or selected retirement was not based on age, but on retirement eligibility. It argues that eligibility for retirement (and ineligibility for LIB or MSA) under its plans depended upon several factors, only one of which was age. Appellant's brief at 26. Those other factors are seniority, the date of involuntary termination and the reason for the termination. However, an example demonstrates that age was the determinative factor.[17] Consider two employees, each

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based on the law of averages and does not predict effects upon one individual. He therefore conceded that in some circumstances an individual who receives LIB and a subsequently vested pension might actually receive more valuable benefits than a retired employee who did not receive LIB benefits. J.App. at 1001. Thus, Westinghouse's contention that the value of early retirement benefits is greater than the value of LIB or MSA plus a deferred pension does not preclude an ADEA violation; individual employees within the protected age group may receive a less valuable benefit than severance pay plus a deferred pension.

[17] Although under Westinghouse's plans age was the determinative factor, we recognize that under the ADEA it is not necessary that age be *the* determinative factor. It is sufficient that age is *a* determinative factor in the complained of decision. *See Bhaya v. Westinghouse Elec. Corp.*, 832 F.2d 258, 259-60 (3d Cir. 1987);

having ten years of service with the company, both terminated on the same date, and for the same reason (*e.g.* location closedown). One employee is age fifty-five at the time of layoff, and the other is thirty-nine. The fifty-five-year-old employee would be eligible for early retirement under the third subcategory of early retirement and therefore would be ineligible for LIB or MSA benefits. *See* 1979 pension plan, § 2.C.3. The thirty-nine-year-old employee, however, would be eligible for LIB or MSA even though his years of service, termination date, and reason for termination are exactly the same as those of the fifty-five-year-old employee. Age, then, is clearly the basis for the denial of severance pay to the older employee. Under Westinghouse's 1979 plans, therefore, retirement eligibility was not a "reasonable factor other than age" because it is inexorably linked with age.

This conclusion corresponds with our decision in *EEOC v. Westinghouse Elec. Corp.*, 725 F.2d 211 (3d Cir.), *cert. denied*, 469 U.S. 820 (1984) ("*Westinghouse I*"), in which we rejected Westinghouse's contention that the 1976 version of its pension and LIB plans, which denied severance pay to laid-off employees who were eligible for early retirement, was based on reasonable factors other than age. We found that eligibility for early retirement is so closely related to age that recognizing it as a justification for the denial of LIB to employees within the protected age group would defeat the purposes of the ADEA. *See id.* at 222-23. *See also EEOC v. City of Altoona*, 723 F.2d 4, 6 (3d Cir.), *cert. denied*, 467 U.S. 1204 (1983); *Borden's*, 724 F.2d at 1394.

Next, Westinghouse argues that severance pay was not denied on the basis of age, but on receipt of an alternate form of post-employment income. According to

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Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1395 (3d Cir.), *cert. denied*, 469 U.S. 1087 (1984); *Smithers*, 629 F.2d at 896-98. *See also Borden's*, 724 F.2d at 1393.

the company, its LIB and MSA plans are part of an integrated benefits program designed to provide a single, immediate post-employment benefit to the greatest possible number of employees.

The district court concluded that Westinghouse's 1979 LIB and MSA plans were not part of an integrated program designed to effectuate a no-double-dipping policy. 623 [sic] F. Supp. at 366-67. The district court, citing specific examples from Westinghouse's plans, rejected Westinghouse's no-double-dipping rationale as inconsistent with the content of the pension and severance pay plans. Under those plans, severance pay and pension benefits have distinctly different purposes. Severance pay was a short-term fringe benefit to provide financial assistance during the adjustment period immediately following layoff; pension benefits were long-term retirement benefits. The district court concluded that pension benefits are not a substitute for severance pay. We agree.

The fact that Westinghouse's pension plan was referenced in the LIB and MSA plans (eligibility for the latter dependent upon ineligibility for early or selected retirement under the former) is insufficent to characterize them as integrated:

> [T]he mere fact that the benefits available to employees under the Pension Plan were to be considered when determining eligibility for LIB . . . does not merge the two plans into a 'coordinated benefit plan.' On the contrary, this interaction shows that the LIB Plan is not an integral part of the Pension Plan.

Westinghouse I, 725 F.2d at 225 (citation omitted). The LIB and MSA plans, under which eligibility for benefits was based on an employee's length of service and the occurrence of a layoff, are more analogous to a fringe benefit than part of an integrated employee benefit plan. *See id.* at 224-25; *see also Borden's*, 724 F.2d at 1396-97 (severance pay policy similar to Westinghouse's

LIB and MSA plans is a fringe benefit, not an integral part of retirement and pension package). LIB and MSA were fringe benefits provided transitionally to ease the shock of layoff. Vested pension benefits, as discussed *supra*, could not be a substitute for LIB and MSA. Therefore, the district court did not err by concluding that Westinghouse's 1979 LIB and MSA plans were not part of an integrated program designed to effectuate a no-double-dipping policy.

B. *Westinghouse's 1982 policies*

As described, *supra*, Westinghouse revised its LIB plan in 1982 (ES&P plan), and its MSA plan in 1985, to provide retirement-eligible employees who are laid off the option of selecting either early retirement benefits or severance pay. Westinghouse contends that these option plans do not violate the ADEA for the same reasons that the 1979 LIB and MSA plans did not: older employees with more service time who retire receive greater income benefits than their younger counterparts who are laid off and receive ES&P or MSA benefits. In our discussion of the 1979 plans, we have already rejected the argument that greater actuarial value cured the age discrimination inherent in the plans.

Westinghouse also argues that even if the 1979 plans violate the ADEA, the option plans, embodied in the 1982 ES&P plan and 1982 Pension plan, are valid because they provide an "additional benefit" to retirement-eligible employees: they can choose the post-employment benefit they most prefer—severance pay or early retirement benefits. The district court concluded that because choosing severance pay under the 1982 plan meant relinquishing valuable pension and insurance benefits, retirement-eligible employees have no real choice but to retire and forego severance pay. The district court concluded that affected employees would be obliged to give up the pension and insurance benefits that accompany

early retirement. 632 F. Supp. at 366 n.12. Because the court concluded that there was no real option, it saw no difference between the 1979 and 1982 plans, and therefore it considered them as one plan.

Westinghouse contends that the 1982 plans give employees a practical choice: if they value severance pay more highly than early retirement benefits, they can choose the former. Westinghouse argues that despite the greater economic value of retirement benefits compared to severance pay, other factors might make severance pay more attractive to a retirement-eligible employee.

The "additional benefit" provided by the option plans, however, does not eradicate those aspects of Westinghouse's 1979 plans that violate the ADEA. Assuming *arguendo* that retirement-eligible employees do have a real choice, whatever choice those employees make, they are treated less favorably than their younger counterparts on the basis of age. A younger laid-off employee who is ineligible for early retirement and receives severance pay does not forfeit already vested retirement benefits. On the other hand, an older employee who is eligible for early retirement forfeits already vested benefits by choosing severance pay. As discussed with regard to the 1979 plan, once an employee reaches the requisite age and years of service for early retirement eligibility, the benefits that accrue to early retirement become vested. By choosing severance pay, pursuant to the 1982 ES&P plan, that older employee automatically forgoes the benefits accompanying early retirement. ES&P plan, § 2(c), J. App. at 1274. The deprivation occurs at the time the older employee chooses severance pay.

The fact that an older employee may receive early retirement benefits at a later date, if recalled when still eligible for early retirement, does not cure the harm inflicted during the period that the older employee was deprived of vested benefits—benefits to which he was

otherwise entitled.[18] Furthermore, there is no guarantee that the employee will be recalled, and therefore he may be forever deprived of his vested early retirement benefits. In that scenario, the older employee has forfeited valuable pension and insurance benefits that accompany early retirement: a supplemental monthly payment for each year of credited service until eligible for Social Security payments; an opportunity to provide continued benefits to a spouse or other person in the event of death; continuation of life insurance; continuation of medical coverage until eligible for Medicare; and continuation of dependent insurance. J. App. at 1815-16. He would be eligible to receive only a "Vested Pension" at age sixty-five (normal retirement age), 1982 Pension Plan, § 2.C.1, J. App. at 1549, which, unlike early retirement, is not accompanied by continued medical, life and dependent insurance, or supplemental pension benefits. 1982 Pension Plan, §§ 12, 19 & 10, J. App. at 1559, 1563, 1557). Similarly, an employee eligible for selected retirement who chooses severance pay over selected retirement benefits forfeits his selected retirement benefits, and qualifies only for a "Vested Pension." 1982 Pension Plan, § 2.D.1, J. App. at 1550.

As with the 1979 LIB and MSA plans, the less favorable treatment afforded older employees by the 1982 ES&P and MSA plans is based on age. Therefore, the

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[18] It is not clear that upon recall the older employee, like the younger employee, retains the option to elect early retirement. Westinghouse contends that if both retirement-eligible employees and nonretirement-eligible employees were recalled, they could both receive early retirement benefits, with the attendant supplements and insurance benefits, if eligible at a later time. The 1982 Pension Plan, however, provides that "An employee who is laid off and would otherwise qualify for Early Retirement . . . but who elected to receive benefits under the [ES&P plan] . . . . shall not qualify for the Early Retirement Pension . . . but shall instead qualify only for a Vested Pension. . . ." 1982 Pension Plan § 2.C.1, J. App. at 1549. Of course, if the older employee loses his early retirement benefits even after recall, this compounds the discriminatory treatment.

district court's finding of age-based discrimination was not clearly erroneous. Retirement eligibility is so closely linked with age that to hold otherwise would be to eviscerate the protection afforded older employees by the ADEA. We therefore hold that Westinghouse's 1982 pension and severance pay plans violate 29 U.S.C. § 623(a)(1).

We note that the cases cited by Westinghouse as support for its position that the option plans do not violate the ADEA are inapposite. In *Britt v. E.I. DuPont de Nemours & Co., Inc.*, 768 F.2d 593 (4th Cir. 1985), the court held that DuPont's Voluntary Reduction of Force (VROF) program did not violate the ADEA. Unlike Westinghouse's program, the VROF program was entirely voluntary. Pension-eligible employees, instead of retiring or continuing to work, could choose severance pay, but only if they deferred certain pension benefits they otherwise would receive upon leaving DuPont. The court concluded that the plan did not violate the ADEA because unlike the severance pay policy in *Westinghouse I*, or *Borden's*, severance pay under the VROF program was not a fringe benefit, but a substitute for the right to continue working. *Id.* at 594. Taking severance pay "amounted in effect to additional wage earning necessitating the deferral of pension benefits in exactly the same way that continuing to work would necessitate deferral." *Id.* at 595. Indeed, that court distinguished both *Westinghouse I* and *Borden's*, which involved severance pay as a fringe benefit. *Id.* at 594-95. As we have stated, severance pay under the Westinghouse plans is a fringe benefit, not a substitute for pre-existing retirement rights.

In *Parker v. Federal Nat'l Mortgage Ass'n*, 741 F.2d 975 (7th Cir. 1984), the employee claimed that his former employer, Federal National Mortgage Association, unlawfully discriminated against him by denying him severance pay because of his retired status. The court, in conclusory terms without analysis (other than distinguishing the case from *Borden's*, which did not involve an option-type severance pay policy), rejected the claim because it was Parker's decision to retire rather than to

be laid off. *Id.* at 981. To the extent that the court held that an option policy like Westinghouse's does not violate the ADEA, we decline to follow it. Furthermore, the court found that Parker was unable to show that he could prove age-based discrimination if the case went to trial. *Id.* It appeared that the decision to terminate Parker was based on legitimate business factors (reasonable factors other than age) such as a contraction in the mortgage industry, and the employer's implementation of a centralization plan.

C. *The § 4(f)(2) defense (29 U.S.C. § 623(f)(2))*

Westinghouse contends that denying severance pay, or providing an option, to retirement-eligible employees who are laid off was part of a bona fide employee benefit plan and therefore, even if otherwise in violation of the ADEA, its plans are exempt from the Act's coverage under § 4(f)(2), 29 U.S.C. § 623(f)(2). Westinghouse also argues that the district court's reliance on our decision in *Westinghouse I* in rejecting the § 4(f)(2) defense was erroneous because we decided that case based on a limited summary judgment record that did not contain the information necessary to demonstrate that Westinghouse's severance pay plans were integrated with its pension plans. That information, according to Westinghouse, was: (1) that the pension and severance pay plans were negotiated contemporaneously for twenty-five years; (2) that pension-eligibility requirements were continually liberalized to allow employees who were previously eligible to receive only LIB, to receive the more valuable pension and insurance benefits; (3) that LIB benefits were increased contemporaneously with increases in value of pension and insurance benefits; and (4) that its plans were designed to effectuate a no double-dipping policy.[19]

[19] Contrary to Westinghouse's contention, the record in *Westinghouse I* was sufficiently complete to allow a determination whether the version of Westinghouse's LIB plan complained of was an

We hold that Westinghouse's LIB, MSA (both pre- and post-1985) and ES&P plans are not exempt under 29 U.S.C. § 623(f)(2). A plan can be exempt under § 4(f)(2) either as an employee benefit plan that itself satisfies § 4(f)(2), or as an integral component of an employee benefit plan that satisfies § 4(f)(2). *See Alford v. City of Lubbock*, 664 F.2d 1263, 1271-72 (5th Cir.), *cert. denied*, 465 U.S. 975 (1982). We have already rejected Westinghouse's argument, both in this opinion and in *Westinghouse I*, that its severance pay policies are part of an integrated benefits scheme designed to provide post-employment benefits to the greatest possible number of employees. Under the Westinghouse plans, severance pay is a fringe benefit for which vested early or selected retirement benefits cannot be a substitute.

We do not find dispositive the fact that the severance pay and pension plans have been negotiated contemporaneously, or that benefits under both were increased contemporaneously. The nature of the plan, rather than the manner in which it was negotiated or formulated, is the determinative factor. As we have stated, severance pay and pension benefits have different purposes under the Westinghouse plans. Although the two types of plans were negotiated together, the substance of the plans demonstrates that they are not integrated—*i.e.* the severance pay plans are not integral components of a comprehensive employee benefits scheme. For the same reason, liberalization of the pension-eligibility requirements to provide the option of pension benefits to employees who were previously able to receive only severance pay does

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integral part of its pension plan. As is apparent from the opinion, the appendix contained the 1966 and 1976 pension plans, and the LIB plan, the structure of which was not materially different from the LIB and MSA plans complained of here. The district court's opinion also contains an extensive description of those plans. 577 F. Supp. 1037-45. Furthermore, as discussed *infra*, even with the additional information in the record after trial, we reach the same conclusion.

not demonstrate integration. Pension benefits are not a substitute for severance pay. Furthermore, we have already found that the severance pay is a fringe benefit and not part of a no-double-dipping policy. These additional factors cited by Westinghouse as being unavailable to this court when it decided *Westinghouse I*, then, do not alter our conclusion that the pension and severance pay plans are not integrated.

In order to qualify as exempt under § 4(f)(2), a plan must involve age-related cost factors: *i.e.* the cost of providing benefits pursuant to the plan must increase with age. *See EEOC v. City of Mount Lebanon*, 842 F.2d 1480, 1491 n.9 (3d Cir. 1988) (citing *Westinghouse I*, 725 F.2d at 224); *see also Borden's*, 724 F.2d at 1396. Westinghouse's severance pay plans do not meet this requirement. The amount of severance pay an employee receives under the Westinghouse plans is based on the employee's length of service with the company, the employee's salary at the time of the layoff, and the reason for the layoff.[20] These factors are not directly related to age, and the costs of supplying severance pay to employees therefore does not increase with age. *Westinghouse I*, 725 F.2d at 224-25 (no age-related cost factors in LIB plan providing severance pay benefits based on length of service and occurrence of a layoff). Consider, for example, two employees who began working at Westinghouse on the same date. One employee was age sixteen at that time, and the other was age thirty-seven. After five years of employment with the company, both are laid off because of location closedown. At the time of the layoff, their salaries are identical. Both employees would receive the same amount of severance pay despite the fact that one employee is age twenty-one and the other is age forty-two. If the conditions allowing lump-sum payment are

[20] *See* 1979 LIB plan, Art. IV, §§ 1, 2 (J.App. at 1302-03); 1975 MSA plan, Part III, § A (J.App. at 1858); 1982 ES&P plan at 2-7 (J.App. at 1815-17).

met, and the employees choose that form of payment, under the ES&P plan, each would receive severance pay equal to seven and one-half weeks salary. *See* 1982 ES&P plan at 2-4 (J.App. at 1815, 1816). Under the LIB plan, the result would be similar. Both employees would receive identical lump sum severance pay equal to five week's salary. *See* 1979 LIB plan at 2-3 (J.App. at 1805). If, on the other hand, the conditions for lump-sum severance pay were not met, or the employees chose not to elect lump-sum payment, under the ES&P plan both employees would receive a weekly benefit equal to sixty percent [21] of their weekly salary until the total maximum sum (seven and one-half weeks salary) has been paid, or until the end of twelve months from the date of layoff. *See* 1982 ES&P plan at 6 (J.App. at 1817). Under the LIB plan, the result is the same, except that the total maximum sum is five weeks salary. *See* 1979 LIB plan at 4 (J.App. at 1806).

Therefore, under Westinghouse's plans, the older employee receives no greater payments than a similarly situated younger employee. In addition, Westinghouse neither provides actuarial proof nor even alleges that it costs more to provide older employees with the same severance benefits as younger employees. *See Mount Lebanon*, 842 F.2d at 1493-94. The cost of supplying the benefits does not increase with age.

Indeed, other courts have recognized that a plan based on the length of service and salary is not necessarily based on age. *See Karlen v. City Colleges of Chicago*, 837 F.2d 314, 319 (7th Cir.), *cert. denied*, 108 S.Ct. 2038 (1988); *Betts v. Hamilton County Bd. of Mental Retar-*

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[21] If the employee received unemployment compensation, the company would supplement those payments until the total was sixty percent of the employee's weekly salary. After unemployment compensation expired, the company would pay the full sixty percent until the employee's right to severance pay expired. *See* 1979 LIB plan at 4; 1982 ES&P plan at 6 (J.App. at 1817).

dation and Developmental Disabilities, 848 F.2d 692, 694 (6th Cir. 1988) (quoting *Karlen*).

In sum, we conclude that Westinghouse's severance pay and pension plans are not exempt under 29 U.S.C. § 623 (f)(2).

D. *Willfulness*

Westinghouse contends that the district court erred by finding that the company willfully violated the ADEA, by applying a three-year statute of limitations and by awarding double damages. There had been no formal legal challenge to Westinghouse's severance pay plans at the time it negotiated the 1979 plans. Westinghouse argues that despite its belief that the 1979 pension and severance pay plan did not violate the ADEA, it changed those plans in 1982 to provide an option of either severance pay or retirement benefits to retirement-eligible employees. Westinghouse maintains that the change was in response to a statement by EEOC counsel (in other litigation) that an option would eradicate the aspects of the 1979 plans that allegedly violated the ADEA. That change, it contends, exemplifies its desire to comply with the Act, and therefore conclusively demonstrates its lack of willfulness.

The district court found that Westinghouse willfully violated the ADEA under the standard adopted in *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985). The *Thurston* standard permits liquidated damages under 29 U.S.C. § 626(b), when "'the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.'" *Id.* at 128 (citation omitted). The Supreme Court did not decide in *Thurston* whether the same standard governs willfulness for the purpose of determining the appropriate limita-

tions period under the ADEA.[22] *Id.* at 127-28. There is a three-year limitations period for willful violations, and a two-year limitations period for non-willful violations. 29 U.S.C. § 626(e)(1) (incorporating 29 U.S.C. § 255(a)). The district court applied the *Thurston* standard of willfulness to the statute of limitations inquiry as well as to the liquidated damages issue. It found that Westinghouse acted willfully and awarded double damages to all injured employees who fell within the three-year statute of limitations.

Subsequent to the district court's decision in this case, we adopted the *Thurston* standard of willfulness to the determination of the appropriate limitations period under 29 U.S.C. § 255(a). *Brock v. Richland Shoe Co.*, 799 F.2d 80, 83 (3d Cir. 1986), *aff'd sub nom. McLaughlin v. Richland Shoe Co.*, 108 S.Ct. 1677 (1988). Although *Richland Shoe* involved a claim under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et seq.*, the same standard of willfulness applies to the statute of limitations inquiry under the ADEA. *See* 29 U.S.C. § 626(e)(1). Therefore, the district court applied the correct standard of willfulness to the statute of limitations inquiry.

In concluding that Westinghouse recklessly disregarded the requirements of the ADEA, the district court essentially relied on four factors to support its finding of willfulness:

> (1) Westinghouse "turned its face from 'the handwriting on the wall' by ignoring . . . judicial invalidations of plans similar to" its own, in particular, *Borden's* and *Altoona*; (632 F. Supp. at 372)
>
> (2) Westinghouse stubbornly resisted compliance with the ADEA by:

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[22] That issue was subsequently decided in the affirmative by the Supreme Court in *McLaughlin v. Richland Shoe Co.*, 108 S.Ct. 1677 (1988).

(a) failing to question or change its policies even after receiving letters of violation from the EEOC;

(b) maintaining its severance pay policies and insisting on their validity, even after commencement of litigation challenging those policies, and this court's ruling in *Westinghouse I*;

(c) taking that action despite having knowledgeable and experienced in-house counsel to ascertain the law and to advise them; and

(d) not violating the ADEA by mere mistake;

(3) Westinghouse belatedly invented a corporate policy against double-dipping to justify its unwillingness to comply with the ADEA; and

(4) the transparency of Westinghouse's good faith argument that (a) the 1979 plan was designed before the enactment of the ADEA and was in accordance with what appeared to be the law at the time, and (b) the 1982 plan was designed in reliance on statements made by EEOC counsel in the New Jersey litigation to the effect that an option plan would cure any discriminatory defects in Westinghouse's plans.

Of those factors, the strongest evidence of willfulness would be that an employer deliberately ignored judicial invalidations of plans similar to its own. Faced with court rulings that similar plans violated the ADEA, an employer's unwillingness to change its own plans is strong evidence of willful behavior. Whether judicial invalidations of other plans put Westinghouse on notice of the invalidity of its plans, depends in part on which plans were in existence at the time of those invalidations. In evaluating willfulness, however, the district

court did not separately consider the 1979 and 1982 plans. In reviewing the district court's decision, we consider those plans separately. For reasons that follow, we conclude that the decisions in *Borden's* and *Altoona* do not support a finding of willfulness with respect to either the 1979 or the 1982 plans.

The severance pay policy invalidated by the Court of Appeals for the Ninth Circuit in *Borden's* provided that employees eligible for retirement (age 55 with 10 years of service) were not entitled to severance pay. 724 F.2d at 1391-92. The court held that retirement eligibility was not a reasonable factor other than age justifying the denial of severance pay, and concluded that the plan discriminated on the basis of age. Although the court in *Borden's* invalidated a plan similar to the Westinghouse 1979 LIB and pre-1985 MSA[23] plans, by the time that case was decided, Westinghouse already had changed its LIB plan to one that allowed employees eligible for early retirement to choose either retirement benefits or severance pay. Because *Borden's* was not decided until after Westinghouse changed its LIB plan, it does not support a finding of willfulness with respect to Westinghouse's 1979 LIB plan. Furthermore, because *Borden's* did not confront an option plan like Westinghouse adopted in July, 1982, it does not support a finding that Westinghouse willfully violated the ADEA by maintaining its ES&P and option-type MSA plans.

Similarly, *Altoona* does not support a finding that Westinghouse willfully violated the ADEA with respect to either the 1979 plans, or the 1982 plans. In that case, we stated that pension eligibility is so closely linked with age that the differential treatment afforded pension-eligible employees was not a "'differentiation[] based on reasonable factors other than age.'" 723 F.2d at 6 (cit-

[23] The timing of the change in the MSA plan is discussed *infra* footnote 26.

ing 29 U.S.C. § 623(f)(1)). We held therefore that singling out pension-eligible persons for forced retirement violates the ADEA. That case, however, involved neither a flat denial of severance pay to pension-eligible employees, nor an option. It did provide notice to Westinghouse that pension eligibility is not a reasonable factor other than age, and that Westinghouse could not deny severance pay based on pension eligibility. However, by the time *Altoona* was decided, Westinghouse had already changed its LIB plan to provide an option (ES&P plan), and no longer flatly denied severance pay to pension eligibles. Therefore, *Altoona* does not support a finding that Westinghouse willfully violated the ADEA with respect to its 1979 LIB and pension plans. Also, because we did not hold in *Altoona* that an option plan violated the ADEA, it does not support a finding that Westinghouse willfully violated the ADEA by maintaining the ES&P and MSA (as revised in 1985) plans.

Westinghouse, then, did not ignore the "handwriting on the wall." At the time *Borden's* and *Altoona* were decided, Westinghouse no longer maintained severance pay plans (except the pre-1985 MSA plan) like the ones invalidated those cases. Furthermore, because those cases did not involve option plans, they did not put Westinghouse on notice that its ES&P and 1985 MSA plans violated the ADEA. Therefore, the decisions in *Borden's* and *Altoona* do not support a finding of willfulness concerning either the 1979 or 1982 pension and severance pay plans.[24]

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[24] We note that Westinghouse did not change its MSA plan to provide an option until September, 1985. Because *Borden's* invalidated a plan similar to Westinghouse's pre-1985 MSA plan, and *Altoona* concluded that pension eligibility was not a reasonable factor other than age, the fact that Westinghouse did not change the structure of the MSA plan until almost two years after *Borden's* and *Altoona* were decided may support a finding of willfulness with respect to the pre-1985 MSA plan.

The district court also found that Westinghouse stubbornly resisted compliance with the ADEA. However, the record indicates that Westinghouse did consider whether its policies violated the ADEA,[25] *see* J. App. at 891-92; 902, 905; 1973, but refused to change its policies. While stubborn non-compliance in the face of contrary judicial authority might well constitute willfulness, good-faith adherence to, and defense of, those policies when the law is unsettled does not establish a willful violation of the ADEA. The district court correctly stated that this court's decision in *Westinghouse I* was evidence at least that the pre-1982 severance pay policies violated the ADEA. However, the district court decision [26] in *Westinghouse I*, which granted summary judgment to Westinghouse, was rendered on July 29, 1982, and this court's decision in that case was published on January 20, 1984. To the extent that the district court decision in *Westinghouse I* supported Westinghouse's position that its 1979 plans did not violate the ADEA, there was no mandate to change its plans.[27] Furthermore, by the time this court rendered its decision in that case, Westinghouse had already changed its plans to provide an option. Our decision in *Westinghouse I* does not support a finding of willfulness with respect to the 1979 plans. Nor does it support a finding of willfulness with respect to the option plans because like *Borden's* and *Altoona*, it did not invalidate an option plan.

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[25] It appears that the earliest letter of violation was issued in June, 1983, after Westinghouse had changed its LIB plan to the ES&P plan, providing an option to retirement-eligible employees. Whether Westinghouse questioned its policies after issuance of those letters is relevant to willfulness on the 1982 ES&P and pension plans only. The district court did not draw that distinction.

[26] *See* 577 F. Supp. 1029 (D.N.J. 1982).

[27] Westinghouse's stated reason for changing to an option even though the district court's decision in *Westinghouse I* supported its position is discussed *infra*.

The district court also cited its rejection of the company's no-double-dipping rationale as support for its conclusion that Westinghouse willfully violated the Act. *See* 632 F. Supp. at 373. The court found that purported justification not credible and labelled it a belated attempt to avoid the ADEA, because it was inconsistent with Westinghouse's pension and severance pay plans. In light of those inconsistencies, *see supra* Part I, we cannot say that the district court's conclusion on this point was clearly erroneous.

The district court rejected Westinghouse's good-faith argument that the 1979 plans were designed before enactment of the ADEA, and that the 1982 plans were designed in reliance upon statements made by EEOC counsel in the New Jersey "Westinghouse" litigation. The court stated that this argument is "[p]erhaps the most telling evidence of the Company's willfulness. . . ." 632 F. Supp. at 373. We recognize that continued maintenance of a plan that was lawful when developed could become the basis for a finding of willfulness if there were subsequent judicial or legislative invalidations of similar plans. Absent such forewarning, however, maintenance of a plan after enactment of a policy-oriented statute such as the ADEA, which broadly governs a plan but does not address the legality of the particular type plan at issue, alone does not support a finding of willfulness. Similarly, the fact that Westinghouse changed its plans in July, 1982 (even after the district court decision in *Westinghouse I* supporting the company's position) in response to statements by EEOC counsel that an option plan would likely cure ADEA violations, by itself does not mandate a finding of willfulness. Therefore, on remand the district court should consider whether these factors support a finding of willfulness in conjunction with other factors it relied on that remain undisturbed by our resolution of this appeal.

The district court also found that when Westinghouse adopted an option plan in July, 1982, it acted not from a desire to comply with the ADEA, but merely "to prolong and ameliorate the predictable unfavorable outcome in litigation over the plans." 632 F. Supp. at 372. Changing a policy in response to litigation, however, does not necessarily support a finding that Westinghouse willfully violated the ADEA. The district court's conclusion may be appropriate, but our review of those portions of the record relied on by the district court does not establish willfulness. On remand, the district court should review the record to determine whether its conclusion was based solely on the fact that Westinghouse changed its plans in response to litigation, or whether it was also based on additional facts and credibility determinations concerning the company's intent.

Conclusion

Because we have concluded that some of the factors relied on by the district court in support of its finding of willfulness do not support such a finding, and because that court did not consider separately the 1979 plans and the 1982 plans when making its willfulness determination, we will vacate the judgment on the issue of willfulness. We will remand to the district court to reevaluate, in a manner consistent with this opinion, whether Westinghouse willfully violated the ADEA. In all other respects, we will affirm the judgment of the district court.

Costs taxed against appellant.

GARTH, *Circuit Judge, dissenting in part*:

My colleagues in the majority have remanded this case to the district court to reevaluate "whether Westinghouse willfully violated ADEA." (Maj. op. typescript at 43.) They have done so even though, after an exhaustive analysis of the district court's seven day trial record and the

district court's 30-page opinion, the majority and I have concluded:

1) the district court's findings are clearly erroneous;

2) no evidence supports the district court's findings;

3) no suggestion appears that the parties were discouraged from adducing additional evidence or lulled into not producing additional evidence;

4) the district court fully complied with Fed. R. Civ. P. 52(a);

5) the district court in every respect applied the correct legal standard; and

6) the record is voluminous and comprehensive: (so much so, that the majority seeks only to have the district court review the very same record from which its original findings were made and as to which no evidence sufficient to sustain those findings appears).

Thus, although I agree with the majority that Westinghouse violated the ADEA and I agree that on this record, and this evidence, that the violation was not willful, I cannot agree that a remand should be ordered. In a case such as this one, where an extensive trial was held, where full opportunity was afforded for evidence to be presented by both parties, where correct legal standings were employed and where requisite findings (albeit clearly erroneous) were made, our disposition must be an outright reversal on the issue of willfulness.

The majority does not explain why, in such a situation a remand should be ordered and, "two bites of the apple" given to a litigant who has failed to produce sufficient evidence to support a desired finding and therefore carry its requisite burden as to a particular issue—in this case the issue of willfulness. By remanding, the majority grants EEOC a second chance to prove that Westinghouse

has willfully violated the ADEA, when EEOC was unable to do so the first time around.

Typically, when a plaintiff brings an action and a court lawfully determines that the evidence is insufficient to sustain the plaintiff's claim, the plaintiff is barred by the principles of res judicata and/or collateral estoppel from seeking a more favorable result by entering another forum to adduce the same evidence in support of the same claim. While I do not claim that the doctrines of res judicata and collateral estoppel are applicable here, the principles of finality enshrined in those doctrines, speak to this very situation and provide the logic for our outright reversal of the district court's holding that Westinghouse violated the ADEA willfully. The majority by remanding this case to the district court, effectively negates the principles of res judicata and collateral estoppel. It does so by allowing EEOC to retry the very same claim that the majority now rejects due to an insufficiency of evidence.

I fail to understand why EEOC should be afforded still another opportunity to reargue before the district court the very same issue which it would be barred from bringing in any other forum. The only appropriate disposition of this appeal is *not to remand* for such a meaningless exercise by the district court, but *to reverse* on the issue of willfulness, even while we affirm the district court's findings on the non-willful Westinghouse violations.

I.

As I understand the jurisprudence which has developed with respect to when a remand to the district court is appropriate, the established precedents provide:

1) District courts are the fact-finders, appellate courts are not. *Pullman-Standard v. Swint*, 456 U.S. 273, (1982). Thus, if a district court fails to make requisite findings as prescribed by Fed. R. Civ. P. 52(a), such a

proceeding should be remanded for the district court to discharge that function. *Shlensky v. Dorsey*, 574 F.2d 131 (3d Cir. 1978).

2) If the district court in making its findings applied, or relied on, an incorrect legal standard, it is appropriate to remand to the district court to rectify it [sic] error by fact-finding under the correct legal standard. *U.S. v. Gypsum*, 333 U.S. 364 (1948); *Black United Fund of N.J. Inc. v. Kean*, 763 F.2d 156 (3d Cir. 1985).

3) If the district court has prevented a party from introducing admissible evidence, or has lulled a party into a false sense of security to the extent that otherwise admissible evidence was not adduced and findings based on such a truncated record were then made by the district court, a remand to frame proper findings on a proper record is appropriate. *Dunn v. United States*, 842 F.2d 1420 (3d Cir. 1988).

4) Finally, remand may be discretionary in other rare circumstances, none of which have any relevance to the present case or to the present record. *Hritz v. Woma*, 732 F.2d 1178 (3d Cir. 1984).

If, however, none of the above conditions obtain, and a district court on a complete, unchallenged, comprehensive record, has made findings which have no support in the evidence, a remand is not the correct disposition. This is particularly so, where no claim has ever been made that a party had additional evidence which it was not permitted to introduce. In such a circumstance, I know of no authority or reason for a reviewing court to remand so that a district court may seek to justify its initial findings on the same record already found deficient to support those findings.

II.

Because I agree with the majority that the district court's findings which establish that Westinghouse violated the ADEA must be affirmed, there is no occasion

for me to address that issue. However as I have indicated, the issue of "willfulness" and the manner by which we dispose of that issue, causes me to part company with the majority.

To understand why I believe there can be no logic or basis for a remand one need only examine the reasons given by the majority in light of its analysis of the district court opinion. I turn to that task.

A.

The majority opinion analyzes the four factors relied on by the district court for the district court's finding of willfulness and concludes that of the four factors, which led the district court to find willfulness on the part of Westinghouse, only one factor may be sustained. In this analysis I join the majority in its holding that the district court's findings and conclusions are flawed. Indeed, I go one step further than my colleagues in the majority, because although they hold that Westinghouse's policy against "double-dipping" may on this record be deemed to support the district court's findings of willfulness, (Maj. op. typescript at 41-2) I do not. This difference between us is not significant, however, because the "double-dipping" policy alone, as the majority and I agree, is insufficient to sustain a finding of willfulness.

Three of the factors on which the district court relied to find willfulness—factors which were rejected by the majority because the findings made by the district court were clearly erroneous—were:

1) Westinghouse had ignored judicial invalidations of plans similar to its own.

2) Westinghouse had failed to change its policies after receiving notification from EEOC and after commencement of litigation challenging its plan.

3) Westinghouse was not in good-faith in contending that its 1979 plan (designed before ADEA was enacted), comported with the law at that time, and that Westing-

house was not in "good faith" when it designed its 1982 plan relying on statements made by EEOC to the effect that an option plan (the centerpiece of the 1982 plan), would cure any defects.

We have rejected the district court's findings and conclusions with respect to each of these factors.

(i)

As to the first factor relied on by the district court, where the district court found that Westinghouse had ignored judicial authorities which had invalidated plans that were similar to its own, we have held the district court erred in so ruling.

The majority opinion correctly reasons that when Westinghouse's plans are considered separately in relation to the judicial precedents which had invalidated so-called similar plans, it cannot be argued that Westinghouse ignored authoritative precedents. The majority opinion analyzed Westinghouse's severance pay plan and Westinghouse's option plan in light of *Equal Employment Opportunity Comm'n v. Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984) and *Equal Employment Opportunity Comm'n v. City of Altoona*, 723 F.2d 4 (3d Cir. 1983), *cert. denied* 467 U.S. 1204 (1984) (Maj. op., typescript pages 38-40) and concludes that "[b]ecause *Borden's* was not decided until *after* Westinghouse changed its LIB plan, [*Borden's*] does not support a finding of willfulness with respect to Westinghouse's 1979 LIB plan." (emphasis added) *Id.* at 38. It goes on to hold that ". . . because *Borden's* did not confront an option plan like Westinghouse adopted in July 1982, it does not support a finding that Westinghouse willfully violated the ADEA by maintaining its ES&P, an option type MSA plan." *Id.* at 39. It further holds that ". . . *Altoona* does not suppport a finding that Westinghouse willfully violated the ADEA with respect to either the 1979 plans or the 1982 plans," *id.*, because ". . . by the time *Altoona* was decided, Westinghouse had already changed its LIB plan to provide an option (ES&P),

and no longer flatly denied severance pay to pension eligibles." *Id.* Moreover, the majority opinion correctly recognizes that ". . . we did not hold in *Altoona* that an option plan violated the ADEA . . . ." *Id.* The majority opinion therefore concludes that Westinghouse did not ignore "the handwriting on the wall" and that *Borden's* and *Altoona* do not support a finding of willfulness concerning any of the Westinghouse plans. *Id.* at 40.

Having so held, and having so dispositively rejected the district court's findings and analysis, I suggest that a remand to the district court to "consider separately the 1979 plans and the 1982 plans" as the majority opinion directs (Maj. op. typescript at 43) would serve utterly no purpose. The district court has exhaustively analyzed the evidence and the law in this respect and, as the majority opinion now reveals, that analysis was flawed. We, on the other hand, have thoroughly assessed the impact of these decisions on Westinghouse's plans, and we have now determined Westinghouse cannot be faulted, at least to the extent of finding willfulness with respect to the plans which it adopted. This is particularly so, since the resolution of the issue of "willfulness," in light of the then prevailing precedents must necessarily entail a legal determination which we are as well equipped to render as the district court. Indeed, we have rendered that decision today.

(ii)

The second factor relied on by the district court, concerning Westinghouse's failure to change its policies, has also been rejected by us. As the majority opinion reasons, Westinghouse's "good-faith adherence to, and defense of" its policies, when the law is unsettled cannot establish a willful violation of the ADEA. (Maj. op. typescript at 41). As a result, Westinghouse's actions concerning either of its plans may not be construed as willful.

(iii)

Finally, we have rejected the district court's finding that Westinghouse was not in "good-faith" when it designed its 1979 plan (before ADEA was enacted), and when it redesigned its 1982 plan in reliance on the statements by EEOC counsel in the New Jersey Westinghouse litigation. We disapproved the district court's finding by holding that there was no clear "forewarning" that Westinghouse's plans were illegal, or that the change to an option plan, based on EEOC counsel's statements, can sustain a finding of willfulness. (Maj. op. typescript at 42.)

(iv)

Therefore, the only factor identified by the district court which could bear on "willfulness", and which was not held to be clearly erroneous by the majority, was the district court's determination that Westinghouse had invented a policy against "double-dipping" in order to justify its unwillingness to comply with the ADEA. Even if that determination was not in error, the majority opinion has appropriately concluded that such a policy against "double-dipping," of and by itself, cannot sustain a finding of willfulness. Thus, this court on its own independent review of the record, properly holds that the findings made by the district court are not supported by evidence in the record and that accordingly, willfulness has not been established.

B.

At this point, therefore, under the majority's analysis of the record, an analysis with which I concur, the district court was clearly erroneous in finding that Westinghouse willfully violated the ADEA. This being so, all that remains is for us to implement our decision by an appropriate disposition of this appeal. However, the majority of the court has concluded its opinion by directing a remand, stating:

> Because we have concluded that some of the factors relied on by the district court in support of its findings of willfulness do not support such a finding, and because that court did not consider separately the 1979 plans and the 1982 plans when making its willfulness determination, we will remand to the district court to reevaluate, in a manner consistent with this opinion, whether Westinghouse willfully violated the ADEA. In all other respects, we will affirm the judgment of the district court.

Maj. op. typescript at 43-4.

Both the majority opinion and this dissent have demonstrated on this record that three of the four factors relied on by the district court to establish "willfulness" are not supported by evidence of record and the fourth factor (a policy against double-dipping), without more, cannot by itself, support such a finding. Thus, no reason exists to remand for district court reconsideration. No purpose can be served by a remand to the district court to reconsider its findings when we have already determined that those findings on this record cannot support a willful violation.

Not only is there no basis in law to remand to the district court (as distinct from an outright reversal), but of equal importance, equitable considerations militate against any further delay in the implementation of the district court's judgment which concludes that Westinghouse had committed a violation of the ADEA.

As EEOC has emphasized in all litigation brought under the ADEA—time is of the essence. EEOC has called our attention to the fact that some of the former employees aggrieved by Westinghouse's violations of the ADEA have already died and, thus, will be unable to receive the direct benefit flowing from the district court's judgment. Moreover, this case from which the present appeal arises was based on charges filed as long ago as

November 10, 1983. The appeal from the district court judgment was itself argued well over a year ago. If we remand to the district court, rather than reverse with a direction to the district court to correct its judgment, this court's decision will mark the beginning of still another stage of litigation and that litigation will undoubtedly continue through months and years to come.

Thus, the most compelling considerations of equity, fairness and law dictate that the only just disposition of this appeal, is to affirm the district court's finding that Westinghouse violated the ADEA and, at the same time, reverse the district court's finding of willfulness, with a direction that the district court modify its judgment accordingly.

Anyone who has studied the district court record and the district court's very comprehensive opinion which has combed, analyzed and sifted every bit of evidence, can only conclude that if there was any evidence which could support a finding of willfulness, the district court would have unquestionably identified that evidence, referred to it in its opinion and thus called it to our attention. To suggest that the district court ignored evidence and factors which would have supported its findings, is to indulge in unwarranted speculation and is to denigrate the thoroughness with which the district court approached its task.

For the foregoing reasons, I disagree strongly with the majority's decision to remand to the district court, as I know of no purpose which can be served by such an action. I, therefore, respectfully dissent from so much of the majority's disposition as would remand to the district court for a redetermination of the issue of willfulness.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-1226

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

v.

WESTINGHOUSE ELECTRIC CORPORATION
Appellant

(D.C. Civil Nos. 83-5457 and 84-4799)

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, HIGGINBOTHAM, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN and NYGAARD, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the Court in banc, is denied.

BY THE COURT,

s/ Anthony Scirica
Circuit Judge

Dated: Jan. 5, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-1226

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

v.

WESTINGHOUSE ELECTRIC CORPORATION
Appellant

(D.C. Civil Nos. 83-5457 and 84-4799)

ORDER
SUR PETITION FOR PANEL REHEARING

Present: HIGGINBOTHAM, SCIRICA and GARTH,
Circuit Judges

1. After consideration of the contentions raised in the petition for rehearing filed by Westinghouse Electric Corporation in the above-entitled case and the response thereto by the Equal Employment Opportunity Commission, and all judges who participated in the decision of this Court having asked for rehearing on the basis of the contentions raised in the petition for panel rehearing, the petition for rehearing is granted. Reargument is not granted in this matter. The panel is unanimously of the opinion that the facts and legal arguments are adequately presented in the briefs and record. Rules of the United

States Court of Appeals for the Third Circuit, Court Rule 12(6)(a).

2. After rehearing, the opinion in the above-entitled matter filed on November 30, 1988, is vacated, and an amended opinion is hereby filed.

3. Judge Garth would also have granted Westinghouse's petition with regard the panel's decision to remand the issue of willfulness to the district court, rather than reversing the district court's willfulness determination. In so voting, Judge Garth relies upon the analysis and reasons set forth in his separate opinion which dissented from the panel's disposition of the willfulness issue. In that opinion, Judge Garth urged that the only appropriate disposition of the willfulness issue was an outright reversal of the district court's willfulness finding.

BY THE COURT,

ANTHONY J. SCIRICA
Circuit Judge

Dated: February 2, 1989

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-1226

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

(D.C. Civ. Nos. 83-5457 & 84-4799)

Present: HIGGINBOTHAM, SCIRICA and GARTH,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by Counsel October 20, 1987, and submitted pursuant to Third Circuit Rule 12(6) on panel rehearing February 2, 1989.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered March 26, 1986, be and the same is hereby vacated insofar as the determination concerning the issue of willfulness and the cause is remanded to the said District Court with direction to reevaluate, in a manner consistent with the opinion of this Court, whether Westinghouse willfully violated the Age Discrimination in Employment Act. In all other respects the said judgment is affirmed. Costs taxed against the appellant.

ATTEST:

s/ [Illegible]
Clerk

February 2, 1988

Costs taxed in favor of the appellee as follows:

Brief $157.76

Certified as a true copy and issued in lieu of a formal mandate on March 7, 1989

Test:

/s/ M. Elizabeth Ferguson
Chief Deputy Clerk
United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action Nos. 83-5457, 84-4799

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

v.

WESTINGHOUSE ELECTRIC CORPORATION

March 26, 1986

MEMORANDUM

KATZ, J.

In the trial of this case, I saw the human wreckage of older Westinghouse employees, let go after years of service to the Company. Because these employees were eligible for their retirement benefits, they were denied the severance pay to which younger workers were entitled. Those persons eligible for early retirement were also denied severance pay, and had to draw down their reduced pension benefits to survive.

This heartless corporate policy was justified by a variety of litigation ploys. These ranged from a belatedly invented corporate "policy" of providing a single income stream to laid off employees, to a claim that the EEOC provided insufficient conciliation efforts, to a farfetched estoppel defense that Westinghouse had relied on the flawed arguments of government lawyers in earlier litigation of this issue which it lost.

I find that Westinghouse's practice of denying severance pay to its older employees eligible for pensions is blatant, willful age discrimination.[1] I therefore enjoin the practice and award double damages to the injured employees.

I also reject the EEOC's shotgun approach of attacking a variety of other Westinghouse employment practices which are protected by law as bona fide pension and seniority arrangements. Therefore, I uphold the Westinghouse practices, other than denial of severance pay, at issue in this case.

This case began on November 10, 1982, with an administrative charge filed with the EEOC by Charles Slackway. *See* Plaintiff's Exhibit 1A. Processing of Slackway's charge culminated on June 7, 1983, with a letter of violation addressed to Westinghouse. *See* Plaintiff's Exhibit 4B. The EEOC tried to conciliate the matter. These efforts proved fruitless, and a complaint was filed in this court in November 1983. The complaint alleged: "[s]ince before June 1, 1980, and continuously up until the present time, Defendant has willfully engaged in unlawful employment practices at its Lester, Pennsylvania facility . . . ." The complaint targeted defendant's "failure to provide Layoff and Income Benefits" to thirty-five named individuals and "all other terminated or laid-off employees aged 60 and older who were eligible for early retirement benefits and/or received early retirement benefits."

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[1] The Age Discrimination in Employment Act ("ADEA"), codified at 29 U.S.C.A. §§ 621-634 (West 1985), "broadly prohibits arbitrary discrimination in the workplace based on age." *Lorillard v. Pons*, 434 U.S. 575, 577 (1978). The Act makes it "unlawful for an employer to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . [or] classify his employees in any way which would . . . adversely affect his status as an employee, because of such individual's age. . . ." 29 U.S.C.A. § 623.

Continued investigation of Slackway's case led to further charges against Westinghouse. Once again, conciliation was unsuccessfully attempted. In August, 1984, the Commission filed an amended complaint that expanded the case by including defendant's Concordville, Pennsylvania facility and increasing the number of plaintiffs to 117. It named the following ADEA violations:

> 1) denying layoff income benefits (LIB) to employees laid off prior to July, 1982, who were eligible for any type of retirement;
>
> 2) after July, 1982, giving laid off employees the option of selecting either LIB or retirement, but not both;
>
> 3) forcing laid off employees to retire prior to age 70 because LIB was not available;
>
> 4) denying early retirement to laid off employees who chose LIB;
>
> 5) denying recall to work to employees who were laid off and forced to retire; and
>
> 6) giving lower retirement benefits to laid off employees who were not eligible for retirement because of age at the time of their layoff, but who later became qualified for retirement benefits.

Plaintiffs subsequently filed a second amended complaint in October, 1984. This complaint expanded the scope of the case to a nationwide complaint embracing all of defendant's employees aged 40 or older, at all of its facilities.[2]

The EEOC's charges implicate eight of defendant's employment plans and practices. The eight challenged

[2] At the time that the EEOC filed its second amended complaint, it also filed a new collateral complaint of the same nationwide allegations. The two matters were consolidated.

practices are: (1) pre-July, 1982, arrangements for pensions and layoff income benefits, (2) post-July, 1982, arrangements for pensions and layoff income benefits, (3) arrangements for management employees, (4) Advanced Retirement Plan I, (5) Advanced Retirement Plan II, (6) an "impact number" process of awarding special benefits to certain employees laid off as a result of location shutdowns, product line relocations, or job movements, (7) limitation of retirement benefits to those actually eligible at time of layoff, and (8) limitation of death prior to retirement benefits to spouses of employees actually eligible for the benefits at the time of death. Before I examine the issues surrounding these plans and practices, it is necessary to set forth their pertinent terms.

The Pre-July, 1982, Arrangements For Pensions and Layoff Income Benefits

Prior to July, 1982, Westinghouse employees were covered by a 1979 pension plan for represented employees, and a 1979 pension plan for non-represented employees. The pertinent characteristics of the plans were identical.

1. The plans encompassed four retirement categories. Thus, employees could take a "normal," "deferred," "early," or "selected" retirement. *See* Joint Ex. 2 at 7, 47-50.

2. Employees were eligible for normal retirement at age 65. Normal retirees were entitled to a nonforfeitable pension if they were employed by Westinghouse on the day before their 65th birthdays and had begun this employment at some time preceding the first day of the month following their 60th birthdays. *See* Joint Ex. 2 at 47.

3. Employees could defer retirement. Retirements could not be deferred beyond the first day of the month following attainment of age 70. *See* Joint Ex. 2 at 47.

4. There were four early retirement possibilities. These were:

a. If an employee was age 60 or older and had 10 or more years of service, then he or she could take an early retirement. *See* Joint Ex. 2 at 47.

b. If an employee was laid off at age 59, and had between 10 and 30 years of service, then the employee could retire after his or her 60th birthday, provided he or she had not been re-employed by Westinghouse. The employee was not eligible for early retirement benefits if he or she received a lump sum, related to length of service, because of the layoff or separation. In other words, the employee could not take LIB. *See* Joint Ex. 2 at 48.

c. If an employee was laid off before age 60, due to a location closedown, and was either age 55 with 10 or more years service, or age 50 with 25 or more years of service, then he or she could take an early retirement. The employee was not eligible for early retirement benefits if he or she received LIB. Employees with contractual rights at another Westinghouse location, and employees offered employment at another Westinghouse location, were not eligible for early retirement. *See* Joint Ex. 2 at 48.

d. If an employee between ages 50 and 60 with 25 or more years of service was laid off due to a job movement or product line relocation, then the employee could apply for early retirement. The employee was not eligible for early retirement if he or she received LIB. *See* Joint Ex. 2 at 48-49.

5. Selected retirement occurred in one of two situations. These were:

a. If an employee had 30 or more years of service then he or she could choose to retire after his or her 58th birthday. *See* Joint Ex. 2 at 49.

b. If an employee between ages 50 and 60 with 30 or more years of service was laid off due to a location closedown or a product line relocation, then he or she could take a selected retirement. The employee was not eligible for selected retirement if he or she received LIB. *See* Joint Ex. 2 at 49-50.

6. Layoff Income and Benefits ("LIB"), was provided to employees with at least two years of service who were laid off through no fault of their own. At minimum, these employees received LIB in an amount equal to four weeks' pay. Employees' Total Maximum Sums of LIB were equivalent to one week's pay for each full year of service. *See* Joint Ex. 13 at 2-3.

7. LIB was provided in several different forms.

a. When layoffs were projected to continue for more than six months, employees could elect to receive the total amount due in one lump sum. This election terminated the employee's relationship with the Company. Thus, the employee lost all recall rights and credits for years of service, other than any rights existing under the pension plan. *See* Joint Ex. 13 at 3.

b. If an employee wished to retain recall rights and service credits, he or she could elect LIB in the form of weekly payments. Under this arrangement, Westinghouse supplemented weekly federal and state unemployment benefits so that the combined benefits equalled 60% of the employee's weekly pay. Receipt of the weekly company contributions was contingent upon receipt of each week's federal and state unemployment benefits. *See id.* at 4. When federal and state benefits expired, weekly company benefits equal to 60% of the employee's weekly pay continued either

until the total maximum sum had been paid out, or until twelve months had passed since the date of layoff. *See id.* at 4.

If an employee was 59 years old and had ten years of service at the time of layoff, the LIB payments ceased when the employee turned sixty and became eligible for early retirement. *See id.* at 4.

If an employee was laid off for a year and had not been offered reemployment with Westinghouse, then weekly payments ceased and the employee received the balance of the total maximum sum in a lump sum. If, however, the employee was laid off within one year of eligibility for early retirement, then the employee received his or her early retirement pension at age 60. *Id.* at 4.

8. Employees were not eligible for LIB if they were eligible for early or selected retirement pension benefits. *See id.* at 2.

The Post-July, 1982, Arrangements For Pensions And Layoff Income Benefits

In July, 1982, Westinghouse implemented certain changes in its pension benefits and LIB programs. The resulting plans apply to all employees.

9. Eligibility for normal retirement continues to accrue at age 65. As before, the retiring employee is entitled to a non-forfeitable pension if he or she was employed by Westinghouse on the day before his or her 65th birthday and had begun such employment before age 60. *See* Joint Ex. 3 at 36.

10. Employees can defer retirement. Retirements may not be deferred beyond the first day of the month following attainment of age 70. *Id.*

11. There are four possibilities for early retirement.

a. If an employee has ten or more years of service, then he or she can take early retirement after

turning 60. If the employee is laid off and elects to receive LIB benefits, then he or she is only entitled to vested pension benefits rather than full early retirement benefits. *See id.* at 36-37.

b. If an employee is laid off after turning 59 but before age 60 and has between ten and thirty years of service, then he or she can retire after turning 60. The employee cannot take early retirement if he or she has returned to employment with Westinghouse before turning 60. If the employee elects to receive LIB, then the employee is not eligible for full early retirement benefits. *See id.* at 37.

c. If an employee is laid off before age 60, due to a location shutdown, then the employee can take an early retirement if he or she meets one of the following age and years of service requirements:

1. Age 55 with 10 or more years of service.
2. Age 54 with 13 or more years of service.
3. Age 53 with 16 or more years of service.
4. Age 52 with 19 or more years of service.
5. Age 51 with 22 or more years of service.
6. Age 50 with 25 or more years of service.

Employees with contractual employment rights at another Company location, and employees offered employment at another Westinghouse Location, are not eligible for early retirement. If an employee elects to receive LIB, then the employee is not eligible for early retirement. *Id.* at 37-38.

d. If an employee between ages 50 and 60, with 25 or more years of service, is laid off due to job movement or product line relocation, then the employee can apply for early retirement. If the employee elects to receive LIB, then he or she cannot receive early retirement benefits. *Id.* at 38.

12. Selected retirement can occur in two situations.

a. If an employee has 30 or more years of service, then he or she can retire between ages 58 and 65. If an employee is laid off and elects to receive LIB, then the employee is not eligible for selected retirement benefits. *Id.* at 38-39.

b. If an employee between ages 50 and 60, with 30 or more years of service, is laid off due to location closedown, job movement, or product line relocation, then he or she can apply for selected retirement. Employees with contractual employment rights at another company location, and employees offered employment at another Westinghouse location, are not eligible for early retirement. If the employee elects to receive LIB, then the employee is not eligible for selected retirement benefits. *Id.* at 39.

13. The post-July, 1982, Employee Security and Protection Plan fulfills essentially the same purposes as the pre-July, 1982, Layoff Income and Benefits Plan. Thus, it provides income protection to employees who are laid off due to a location shutdown, job movement, product line relocation, or other reasons associated with the business rather than the employee's fault. *See* Joint Ex. 14 at 1. The plan provides LIB under essentially the same terms as the pre-July, 1982, plan. *See id.* at 2, 2-6; *see also supra* paragraph 7 (describing the pre-July, 1982, LIB arrangements). The plan also encompasses Westinghouse's "impact number" process for awarding enhanced benefits for layoffs due to job movements, or product line relocations. *See* Joint Ex. 14 at 4-5; *see also infra* paragraphs 30-31 (describing impact number process).

14. If an employee is laid off after turning 59 and has 10 years of service, then he or she can elect to retire at age 60. If the employees makes this election, then he or she receives LIB until turning 60 or until the total maximum sum is paid, whichever is first. *Id.* at 7.

Westinghouse's Arrangements For Management Personnel

15. There are three components to Westinghouse's arrangements for its managerial employees. These are: a management separation allowance program ("MSA"), *see* Joint Ex. 20, a pre-retirement income plan ("PRIP"), *see id.*, and an executive pension plan, *see* Joint Ex. at 4.

16. MSA benefits are similar to LIB benefits. MSA provides a total dollar sum in an amount related to years of service and level of salary at the time of separation. This sum is payable on a monthly or lump sum basis. *See* Joint Ex. 20.

17. If an employee desires MSA in a lump sum, then he or she must specifically request that form of payment. If the employee makes this election, then he or she forfeits life insurance benefits. *Id.* at 9-10. Under the monthly payment scheme, life insurance benefits, hospital expense and surgical operation insurance, maternity benefits, and major medical protection benefits continue with MSA payments or for 12 months, whichever period is shorter. *Id.* at 9. All other insurance benefits terminate on the last day worked. *Id.* at 10.

18. If an employee is laid off but is subsequently re-employed by Westinghouse, then he or she can keep all monthly payments received up to that time; however, lump sum payments in excess of the amount that would have been received in the monthly payments must be repaid. *Id.* at 11.

19. Prior to September, 1985, MSA benefits were not available to management employees who were eligible for an early or selected retirement pension either at the time of separation or at age 60. *Id.* at 7. Such employees may now select either MSA or pension benefits; however, they may not receive both. *See* T. Sept. 6 at 119-21.

20. PRIP provides lifelong monthly supplements to early or selected retirement pension benefits. *Id.* at 19.

21. PRIP benefit levels are determined by the reason for the employee's separation, and the employee's age and length of service. *Id.*

22. A management employee aged 59 but not yet 60, with between 10 and 30 years of service, receives monthly PRIP payments equivalent to the early retirement pension and PRIP supplement which he or she will receive at age 60. *Id.* In other words, such employees are treated as if they already are age 60, except that all money received is in the form of PRIP rather than allocated between pension benefits and PRIP. In order to qualify for such treatment, the reason for separation must be other than a location shutdown. *Id.* at 20.

23. Westinghouse also has an executive pension plan for its managerial employees. *See* Joint Ex. 4.

Advanced Retirement Plans I & II

24. Westinghouse operated two advanced retirement programs during the time period in question. These plans are known respectively as ARP I and ARP II.

25. ARP I was in effect from June 1, 1982, through November 1, 1982. It provided certain benefits to employees who voluntarily chose to advance their date of retirement from locations with announced or contemplated reductions in force. *See* Joint Ex. 5 at 1. These benefits stemmed from pension plan improvements scheduled to take effect after the employees' chosen retirement dates. Thus, ARP I removed incentives to delay retirement by making improved benefits available to employees who would not have received such benefits without delaying retirement. The purpose of the program was to eliminate the need to separate less senior employees by encouraging attrition through voluntary retirement. *See id.* Thus, the number of ARP I participants was to correspond to the number of employees who would otherwise be subject to the reduction in force. Similarly, the

program was restricted to employee categories affected by the reduction in force. *Id.*

26. ARP I participants had to be eligible for retirement at some time between June 1, 1982, and November 1, 1982. Thus, they had to be age 58 with 30 or more years of service, or age 60 with 10 or more years of service, during the relevant time period. *Id.* at 2.

27. The ARP I pension plan improvements were effective on August 1, 1982. Employees who were eligible to retire before that date could elect to retire, and were furloughed until August 1. They received any supplement that was necessary to make unemployment compensation payments equivalent to pension plan benefits in effect at the time of furlough. *Id.* at 1. On August 1, these employees retired and commenced receiving their improved pension benefits. *Id.*

Employees who were eligible to retire after August 1 could elect to retire on that date or, upon becoming eligible to retire, on the first day of any subsequent month up to November 1, 1982. Upon retirement, they received pension benefits under the improved plan. *Id.* at 1-2.

28. ARP II was similar in operation and purpose to ARP I. It was in effect between March 1, 1983, and September 1, 1983. *See* Joint Ex. 7. Like ARP I, it applied to locations and employee categories with announced reductions in force. *Id.* Participants had to be eligible for retirement at some time between March 1, 1983, and September 1, 1983. Thus, they had to be age 58 or 59 with 30 or more years of service, or age 60 or older with 10 or more years of service. *See* Joint Ex. 8.

29. ARP II pension plan improvements were effective on January 1, 1984. *See* Joint Ex. 7. ARP II participants were furloughed until that date. While on furlough, they received any payments necessary to bring their unemployment compensation up to 60% of their pay. *See*

Joint Ex. 8. On January 1, their retirements became effective and they commenced receiving their improved benefits. *Id.*

The Impact Number Process

30. The so-called "impact number process" is utilized in the event of layoffs due to job movements or product line relocations. *See* Joint Ex. 14 at 4-5. Such layoffs result from "the permanent discontinuance of the manufacturing of a product at a Company Location, provided that product continues to be produced by the Company, but at a different Westinghouse Location." *See* Joint Ex. 11a at 102.

31. When a job movement or product line relocation takes place, the Company estimates the "number of employees on jobs affected" at the location experiencing the job movement or product line relocation. Joint Ex. 14 at 4. This number is also referred to as an "impact number." The Company then assumes that any employee who is laid off from the location is affected by the job movement or product line relocation. *Id.* This assumption continues until the number of employees laid off at the location matches the pre-established impact number. *Id.* The impact number is also reduced by "normal attrition." *Id.* If the impact number is not matched within five years after announcement of the job movement or product line relocation, then impact numbers cease to be available. *Id.*

32. Employees laid off from the location before the impact numbers are used up receive enhanced benefits. For employees with 15 or more years of service, these benefits take the form of a lump sum payment equal to one and one half times a week's pay for each full year of service. Employees can elect one of the regular LIB options instead of the lump sum. Employees age 50 with at least 25 years of service can elect early retirement instead of the lump sum payment. *Id.* at 4-5.

Limitation of Retirement Benefits to Employees Eligible At Time of Layoff or Death

33. Westinghouse retirement benefits are distributed according to eligibility criteria comprised of various combinations of age and years of service. The 1979 pension plan criteria are set forth in paragraphs 2-5, *supra*. The 1982 pension plan criteria are set forth in paragaphs 9-15, *supra*. In order to receive benefits, employees must have attained one of the requisite age and service combinations at the time of retirement or layoff.

34. Both the 1979 and 1982 Westinghouse Pension Plans provide benefits to the spouses of employees who died before attaining retirement age. To qualify for such benefits, the recipient spouse must have been married to the deceased employee for at least one year. Furthermore, the deceased employee must have completed 30 years of service, or have attained age 50 and completed 15 years of service, or have attained age 60 and completed 10 years of service. *See* Joint Ex. 1 at 8; Joint Ex. 3 at 3.

35. Eligible spouses receive monthly pension payments for life. In any event, payments attributable to the contributory portion of the pension plan are guaranteed for 60 months. Thus, if the spouse dies before receiving 60 payments, the balance due fom the contributory portion of the plan is paid to a designated beneficiary. *See* Joint Ex. 1 at 8; Joint Ex. 3 at 3.

DISCUSSION

Issues In The Case

The EEOC charges that each of the above-described plans violates the ADEA. I will briefly describe plaintiff's arguments, as well as Westinghouse's responses. I will then analyze the merits of the parties' contentions.

1. The EEOC contends that the interaction of eligibility criteria for retirement and pension benefits with

eligibility criteria for severance pay violates the ADEA because it results in denial of severance pay on the basis of age. Under the 1979 pension plan, employees who were laid off and were eligible for any type of retirement could not receive severance pay. Under the 1982 pension plan, laid off employees who were eligible for retirement could choose between pension benefits and severance pay, but could not receive both. Until September, 1985, management personnel who were eligible for retirement were not eligible for severance pay.

Westinghouse contends that the interaction of its severance pay plans and pension benefits plans does not violate the ADEA. On the contrary, it argues that the plans are *bona fide* employee benefit plans exempt from the ADEA. *See* 29 U.S.C.A. § 623(f)(2).

2. The EEOC contends that ARP I and ARP II effectively forced or induced older laid off employees to retire and take their pensions. The EEOC interprets the ADEA to require distribution of both LIB and pension benefits; it contends that employees would not have participated in ARP I and ARP II if they had been able to take both LIB and their pensions.

In response, Westinghouse avers that participation in ARP I and ARP II was voluntary. According to Westinghouse, employees participated in ARP I and ARP II because "the total package of early retirement benefits was more valuable to them than LIB would have been and because the ARP programs offered 'considerable [benefits] in favor of the pensioner.'" *See* Defendant's Post-Trial Brief at 63.

3. The EEOC challenges

> the terms of the Pension Plan that preclude a laid off employee who was not old enough to retire when laid off from retiring upon attaining the minimum age. For example, an employee laid off at age 58

> with 10 years of service cannot retire when he turns 60. Instead, the employee is limited to a lower Vested pension, without a pension supplement and without continuation of insurance.

Plaintiff's Post-Trial Memorandum at 59. According to the EEOC, the employee who is laid off with the requisite years of service should receive benefits when he or she attains the requisite age. For example, if an employee with 15 years of service is laid off at age 48, then benefits should commence when the employee turns 50.

The EEOC similarly challenges the limitation of death prior to retirement benefits to spouses of employees who were actually eligible for them at the time of death. According to the EEOC, benefits should be distributed upon the anniversary of the deceased's qualifying birthday. That is, if an employee dies with 15 years of service dies [sic] at age 48, then benefits should commence when the deceased would have turned 50.

Westinghouse contends that the limitation of retirement benefits and death prior to retirement benefits to employees and spouses of employees actually eligible at the time of layoff or death is permissibly justified by cost considerations.

4. Because layoffs proceed on a "last hired, first fired" basis, employees most likely to receive impact numbers and consequent enhanced benefits are those with the least seniority. The EEOC therefore contends that the impact number process discriminates against older employees because they are disproportionately unable to receive impact number benefits.

Westinghouse contends that this effect is the result of a *bona fide* seniority system exempt from the ADEA. *See* 29 U.S.C.A. § 623(f)(2).

5. Westinghouse offers three affirmative defenses to the EEOC's charges. First, it contends that the EEOC

is estopped from challenging the 1982 pension plan. Second, it argues that the EEOC did not meet its statutory obligation to conciliate any alleged violations other than those in the original complaint. Third, it argues that the EEOC's amended complaints are barred by the statute of limitations. Westinghouse therefore urges that all allegations other than those in the original complaint pertaining to the 1979 plan should be dismissed.

6. The final issues in this case involve the question of willfulness. Under the ADEA, a finding of willfulness triggers application of a three year statute of limitations. It also triggers availability of liquidated damages. If I find Westinghouse in violation of the ADEA, I must therefore determine three things. First, I must select the applicable willfulness standards for statute of limitations and liquidated damages purposes. Second, I must determine whether the three year statute of limitations applies to this case. Third, I must determine whether liquidated damages are available to the plaintiffs in this case.

I will begin with defendant's affirmative defenses. Next, I will consider the validity of defendant's LIB and pension plan arrangements. I will then consider the remaining challenged practices: ARP I and ARP II, the limitation of retirement benefits and death prior to retirement benefits to employees and spouses of employees actually eligible at the time of layoff or death, and the impact number process. Finally, I will take up the willfulness issues.

Defendant's Affirmative Defenses

I reject defendant's affirmative defenses. Thus, the EEOC is not barred from litigating any of its claims and all of the above-described issues are properly before this court.

1. Estoppel

In 1982, Westinghouse changed its programs to provide an option between LIB and pension benefits. It claims that these changes were made in reliance upon statements made by the EEOC. It therefore argues that the EEOC is estopped from challenging Westinghouse's 1982 practices.

Westinghouse's estoppel claim is based upon events in another lawsuit in the United States District Court of New Jersey.[3] In the course of that litigation, counsel for the EEOC argued that provision of an option between LIB and pension benefits would satisfy the ADEA. Specifically, counsel for the EEOC stated: "What they are entitled to be is made whole under . . . the Age Section, and to be made whole they are only entitled to that option, [between taking early retirement benefits or severance pay] whichever one they accepted." *See* D. Ex. 38(b) at 37-38. Westinghouse also relies upon arguments made by the EEOC in a reply brief filed with the Third Circuit during its appeal from the District Court's decision. The pertinent terms of the brief stated: "the Commission has always asserted that the employee age 55 and over should have had the option to choose either severance pay or early retirement payments. . . . Such an option would not have been discriminatory." *See* D. Ex. 38(a) at 8-9.

In order to establish estoppel under the ADEA, Westinghouse must show that it acted in good faith conform-

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[3] The litigation, entitled *EEOC v. Westinghouse Electric Corporation*, is reported at 577 F.Supp. 1029 (D.N.J. 1982). The case involved a challenge to Westinghouse's denial of LIB to employees, laid off from Westinghouse's Belleville, New Jersey plant, who were eligible for retirement benefits. The District Court granted Westinghouse's motion for summary judgment. The Third Circuit reversed the grant of summary judgment and remanded the case to the District Court. *See* 725 F.2d 211 (3d Cir. 1983). The United States Supreme Court denied certiorari. *See* —— U.S. ——, 105 S.Ct. 92 (1984).

ity with, and in reliance on, a written administrative regulation, order, ruling, approval, or interpretation of the EEOC. *See* 29 U.S.C.A. § 259 (West 1985) (Portal-to-Portal Act, incorporated into ADEA by 29 U.S.C.A. § 626(e)). Reliance upon an oral declaration of an agency official is not sufficient to estop the government. *See Anness v. United Steelworkers of America*, 708 F.2d 917, 921-22 (6th Cir.1983) (interpreting estoppel provisions of ADEA). This means that Westinghouse must have relied upon a formal, written agency pronouncement. *Id.*

To establish non-statutory, equitable estoppel, Westinghouse must demonstrate the existence of several elements. These are: 1) EEOC words, acts, conduct or acquiescence causing Westinghouse to believe that an option arrangement would satisfy the ADEA, 2) EEOC willfullness or negligence with regard to such acts, conduct or acquiescence, and 3) detrimental reliance by Westinghouse. *See Lovell Manufacturing v. Export-Import Bank of the United States*, 777 F.2d 894, 898 (3d Cir.1985). Westinghouse's reliance must have been reasonable. *Id.* (quoting *Heckler v. Community Health Services of Crawford County, Inc.*, —— U.S. ——, 105 S.Ct. 2218, 2224 (1984)). Finally, because Westinghouse seeks to estop the government, there must have been some affirmative misconduct on the part of the EEOC. *Id.* at 899.[4]

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[4] Westinghouse urges that this case is a private action because the EEOC seeks money due to individual citizens. Westinghouse therefore argues that it is seeking to estop a private party rather than the government. Nonetheless, I find that this case involves estoppel of the government.

"[T]o the extent that a Title VII suit by the EEOC seeks recovery of sums due individual citizens . . . it is a private and not a public action. . . ." *EEOC v. American Machine & Foundry, Inc.*, 13 Fair Empl.Prac.Cas. (BNA) 1634, 1626 (M.D.Pa. 1976). "[T]o the extent that it seeks other relief, such as an injunction against future discriminatory practices, it is a public action. . . ." This

I find that Westinghouse has not established the elements of estoppel. First, even assuming that the words or acts of counsel for the EEOC caused Westinghouse to change its LIB and pension plans, and even assuming that counsel for the EEOC acted willfully or negligently and engaged in affirmative misconduct, any reliance by Westinghouse was unreasonable.

The EEOC is not bound by erroneous statements of its trial counsel. *See Donovan v. I and J, Inc.*, 567 F.Supp. 93, 104 (D.N.M.1983). EEOC trial counsel had no actual or apparent authority to speak for the agency as a whole. *Cf. Santos v. Franklin*, 493 F.Supp. 847, 855-56 (E.D.Pa.1980) (actual and apparent authority of government actor are relevant to estoppel). Westinghouse's experienced counsel were well aware of the limits of EEOC counsel's authority. Any reliance on EEOC counsel's statements was therefore unreasonable.

Westinghouse's purported reliance is also unreasonable because of the nature and context of the statements of EEOC counsel. The statements were not official agency pronouncements directed towards charting a course of future conduct. On the contrary, they were arguments

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case obviously includes public action features. Moreover, estoppel in this case presents considerations of public importance, because Westinghouse seeks to use statements made in the course of litigation to estop subsequent litigation.

> When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well-settled that the Government may not be estopped on the same terms as any other litigant.

Heckler v. Community Health Services of Crawford County, Inc., —— U.S. ——, 104 S.Ct. 2218, 2224 (1984). Estoppel in this case would affect the ability of government agencies effectively to litigate issues of public importance. It might foster hesitant advocacy. It might also foster hindrance of government counsel through their predecessors' mistaken or hasty statements. Standards for estoppel of the government therefore should apply.

made in the process of advocacy. Such statements do not bind the EEOC. *See Heckler v. Community Health Services of Crawford County, Inc.*, 104 S.Ct. at 2227; 29 U.S.C.A. § 259 (requiring formal, written agency pronouncement for estoppel under the ADEA).

At bottom, I find that Westinghouse in fact did not rely upon the statements of EEOC trial counsel. Instead, the 1982 change was an independent tactical decision made for a perceived litigation advantage. Stuart Saltman, Westinghouse Chief Counsel for Human Resources, testified that he reviewed the transcript of EEOC trial counsel's statements made in the District Court of New Jersey. He then recommended that "serious consideration" be given to "attempting to . . . cut off future liability with respect to the issues that were involved in the L.I.B. . . . litigation . . . and serious consideration be give[n] [sic] to cutting down future liability by adopting the position that EEOC had taken as reflected in the statements. . . ." *See* T. Sept. 10 at 42 l. 9-15. Mr. Saltman's recommendation was based upon more than the transcript, however. He testified that it stemmed from

> continuing familiarity with the position that the EEOC had taken, which I had both heard from others and seen in the documents that had been submitted to me over the course of the history of this thing. . . . This [transcript] was a confirmation in writing, of the fact that that was the EEOC's position . . . in 1978. . . . [t]he attorney on my staff who was handling the case walked in, sat down in my office and said he had been talking to the Department of Labor about the charge . . . and said that the Department of Labor in essence takes the position that the plan is illegal because it didn't provide an option.

See T. Sept. 10 at 48-50.[5] Mr. Saltman thus perceived what he believed was the government's "informal position" as early as 1978, but the Company made no change until July, 1982. The change was set in motion no earlier than March, 1982. *See id.* at 51. The delay suggests that the Company did not rely upon the statements of EEOC trial counsel.

Even if there was reliance, it was not detrimental, because Westinghouse did not change its position for the worse. Westinghouse claims that its 1979 plan was valid; it implemented the 1982 plan as an independent business and legal judgment to reduce the risks of future liability. *See* T. Sept. 10 at 42 l. 4-24, 43 l. 1-8. If the statements had not been made, Westinghouse would have defended its 1979 plan. In short, Westinghouse's position did not change in reliance on the EEOC lawyer's argument in the New Jersey case.

Finally, there is no sign of any affirmative government misconduct supporting estoppel. *See Donovan v. I and J, Inc.*, 567 F.Supp. at 103-04. Mere provision of erroneous information is usually not sufficient to establish estoppel. *See Portmann v. United States*, 674 F.2d 1155, 1165 (7th Cir.1982); *Donovan v. I and J, Inc.*, 567 F.Supp. at 104. At minimum, estoppel appears to require an "affirmative misrepresentation." *See Santos*, 493 F.Supp. at 853. The statements at issue in this case cannot be so characterized. Trial counsel's statements were not affirmative misrepresentations because his role did not involve policymaking. He was arguing a case, not stating EEOC policy.[6]

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[5] Neither Mr. Saltman nor anyone else at Westinghouse ever attempted to ascertain whether this was in fact the EEOC's position. *See* T. Sept. 10 at 18-20. Statements that may have been made by Department of Labor lawyers cannot bind the EEOC, for the same reasons that the Commission is not bound by the statements of trial counsel. *See Donovan v. I and J, Inc.*, 567 F.Supp. 93, 104 (D.N.M. 1983).

[6] Westinghouse has renewed its efforts to establish estoppel by submitting a motion to supplement the trial record and defendant's

2. EEOC Good Faith and Conciliation

According to Westinghouse, the EEOC failed to conciliate any claims other than those regarding the pre-1982 LIB program at the Belleville, New Jersey and Lester, Pennsylvania facilities. The Company therefore urges that all other charges should be dismissed. Under the ADEA, the EEOC must "attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of [the ADEA] through informal methods of conciliation, conference, and persuasion." *See* 29 U.S.C.A. § 626(b). This means that the Commission must give employers an opportunity to comply voluntarily with the ADEA. *See Brennan v. Ace Hardware Corp.*, 495 F.2d 368, 374 (8th Cir.1974). "'Formal methods'" of enforcement are to be applied "'only in the ultimate sense.'" *Id.* (quoting legislative history). In practice, fulfillment of the obligation to conciliate must be evaluated on the facts in each case. *See Marshall v. Sun Oil Company (Delaware)*, 605 F.2d 1331, 1334 (5th Cir.1979). Nonetheless, some requirements appear to be common to all cases. The employer must be told how to achieve compliance: "[p]ersuasion cannot be accomplished if the desired goal is unknown." *See Brennan*, 495 F.2d at 375. Specifically, the employer should be informed (1) of the ways compliance may be achieved, (2) that affected employees may receive "make whole" remedies, (3) that the Commission may institute legal action, and (4) that the employer may

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post-trial brief. Westinghouse seeks to submit transcripts of congressional hearings regarding the appointment of Jeffrey Zuckerman as General Counsel for the EEOC. Statements made by Mr. Zuckerman purportedly support defendant's position on the issues of estoppel, the statute of limitations, and willfulness. Defendant's motion grabs at straws. Mr. Zuckerman's testimony at a confirmation hearing presumably reflects his personal position regarding EEOC enforcement. Because of their nature and context, his statements cannot bind the EEOC. Moreover, Westinghouse obviously did not rely on these statements made long after the period at issue in this case.

respond to the Commission's allegations. *See Marshall v. Sun Oil Company (Delaware)*, 605 F.2d at 1334-35; *see also Brennan*, 495 F.2d at 375. I find that the Commission met all of these requirements.

Westinghouse was made aware that the Commission's goal was elimination of the named practices. Westinghouse also knew that "make whole" remedies were implicated because the Commission advised Westinghouse that "full restitution" in the initial Slackway case entailed full eligibility for LIB. *See* P.Ex. 4C. The letters of violation issued to Westinghouse advised the Company of the Commission's allegations, invited conciliation, and explicitly referred to the possibility of litigation. Moreover, a follow-up to the July 16, 1984, letter of violation advised Westinghouse that "while we will continue to attempt to reach a voluntary settlement of this case, the case will be referred to the Legal Unit for litigation consideration." *See* P.Ex. 4E, 4F, & 4G.

The Commission also fulfilled its duties in the actual conciliation process. The EEOC's compliance with its obligation to conciliate is measured by the effort it expends. *See, e.g., EEOC v. KECO Industries, Inc.*, 748 F.2d 1097, 1102 (6th Cir.1984) (court should only determine whether EEOC attempted conciliation; form and substance is within EEOC discretion); *EEOC v. Prudential Federal Savings & Loan Association*, 763 F.2d 1166, 1168 (10th Cir.) (enough that Commission makes a sufficient albeit limited effort to conciliate), *cert. denied*, —— U.S.——, 106 S.Ct. 312 (1985). The EEOC's efforts are sufficient if "it makes a sincere and reasonable effort to negotiate by providing the defendant an 'adequate opportunity to respond to all charges and negotiate possible settlements.'" *See id.* at 1169 (quoting *Marshall v. Hartford Fire Insurance Company*, 78 F.R.D. 97, 107 (D.Conn. 1978)).

The EEOC's conciliation attempts in this case met these criteria. In June, 1983, the Commission attempted

to conciliate the initial Slackway charge. *See* P.Ex. 4B, 4C. After meeting with the EEOC, Westinghouse rejected the Commission's conciliation proposal. *See* P.Ex. 4C. The EEOC then advised Westinghouse that it would consider litigation but would also continue to attempt a voluntary settlement. *See* P.Ex. 4D. On July 16, 1984, the EEOC issued its second letter of violation. The letter added new charges, and again offered conciliation. *See* P.Ex. 4E. Westinghouse did not respond to the conciliation offer. *See* P.Ex. 4F. On September 14, 1984, the EEOC issued its third letter of violation. This letter expanded the case to nationwide scope, and again offered conciliation. *See* P.Ex. 4G. Once again, Westinghouse did not respond to the conciliation offer. *See* T. Sept. 10 at 64 l. 1-19. Finally, I ordered a conciliation effort. Pursuant to my order, a conciliation conference took place in January, 1985. *See id.* at 67-70. Westinghouse subsequently informed the EEOC that it found the Commission's conciliation proposal "unacceptable in its present form." *See* P.Ex. 4H. Clearly, the Commission made a sustained conciliation effort.

Westinghouse alleges that the Commission's efforts were not genuine, because the EEOC acted in bad faith. Westinghouse supports this allegation with several arguments. First, Westinghouse argues that the EEOC could not, and did not, approach conciliation in good faith once it began litigation on the Slackway charge. Second, Westinghouse contends that the Commission did not adequately investigate the charges leveled in its letters of violation. Third, Westinghouse argues that the EEOC demonstrated bad faith by giving Westinghouse too short a time to respond to the letters of violation.[7] Finally, Westinghouse

[7] The July 16, 1984, letter of violation gave Westinghouse until July 23, 1984, to accept in writing the Commission's conciliation offer. The letter instructed that failure to respond by that date would lead the Commission to presume that Westinghouse rejected the conciliation offer. *See* P.Ex. 4E. Similarly, the September 14,

contends that the EEOC came to the court-ordered conciliation with five new inadequately investigated allegations, ignored court orders to suspend discovery during the conciliation period, and revealed its insincerity by designating its trial attorney as its conciliator.

I find that the EEOC acted in good faith. It is of no consequence that the EEOC added, and attempted to conciliate, charges after filing a judicial complaint. Once a letter of violation has been sent, the employer is well aware that litigation may ensue. Thus, "[a]ctions initiated by the Secretary before the termination of conciliation would not place undue pressure on the employer to settle the charges. . . ." *See Vance v. Whirlpool Corporation*, 707 F.2d 483, 488 (4th Cir.), *modified* on other grounds, 716 F.2d 1010 (4th Cir.1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 1600, 2678 [sic] (1984). While it is true that "a Commission lawsuit brought before any attempt at conciliation is premature," *see EEOC v. Hickey Mitchell Co.*, 507 F.2d 944, 948 (8th Cir.1974) (Title VII case), a suit is not premature once conciliation has commenced. What is crucial is provision of an opportunity to conciliate. *See id.*

I find that Westinghouse was provided with conciliation oppportunities. Westinghouse was informed adequately of the Commission's allegations. The letters of violation named specific Westinghouse policies and practices. While the EEOC did not give Westinghouse a great deal of time to consider its charges and conciliation offers, Westinghouse only had to make an initial decision whether to respond in good faith. A full-blown answer was not required. Thus, the Company was given an adequate response time. Nonetheless, it did not respond.

1984, letter of violation requested a written response by September 24, 1984, and advised that failure to respond would be interpreted as a rejection of conciliation. *See* P.Ex. 4G. Westinghouse incorrectly interprets these short response times as a sign that the EEOC was not anticipating or hoping for conciliation.

The fact that the Commission did not limit itself to the charges enumerated at the outset does not mean that it acted in bad faith. The EEOC is not limited to its initial allegations; rather "a complaint filed by the EEOC is limited to the investigation *reasonably expected* to grow out of the initial charge of discrimination." *EEOC v. KECO Industries, Inc.*, 748 F.2d 1097, 1101 (6th Cir. 1984). In *KECO Industries, Inc.*, an individual sex discrimination charge broadened into an EEOC claim on behalf of all of the defendant's female employees. The Sixth Circuit held that this was proper because "the only difference between the later charge and . . . initial charge is the number of persons victimized. . . . As this later class-based claim brought by the EEOC could have reasonably been expected to grow out of Ms. Grimes' individual complaint of discrimination, no new additional proceedings were necessary." *See id.* at 1101.[8] Because all of the allegations in this case involve the operation of defendant's LIB and pension plans, Westinghouse could "reasonably have expected" the additional charges in the EEOC's second and third letters of violation to grow out of the initial Slackway charge regarding denial of LIB.

Westinghouse's arguments in effect urge that the Commission must thoroughly investigate and present all charges at the outset of the conciliation process, and that the filing of a court complaint bars all further investigation, conciliation, or development of the case. I disagree. The EEOC does not have to conduct an exhaustive investigation before it may act. *See e.g., Marshall v. Hartford Fire Insurance Co.*, 78 F.R.D. 97 (D.Conn.1978).

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[8] *EEOC v. KECO Industries* is a Title VII case, but its principles also apply to the ADEA. The ADEA and Title VII are parallel statutes; the substantive provisions of the ADEA "were derived *in haec verba* from Title VII." *Lorillard v. Pons*, 434 U.S. 575, 584 (1978); *Hodgson v. First Federal Savings & Loan Association*, 455 F.2d 818, 820 (5th Cir. 1972).

> An independent requirement of exhaustive investigations would reward the employer who discriminates on a large scale and undermine the legislative goal of obtaining voluntary compliance in these cases. The large scale discriminator would present the Secretary with an onerous and costly burden of investigation if the Secretary were required to prove each individual case of discrimination. Because a limited number of investigators is available, such a burden would frustrate the Secretary's ability to attempt conciliation in many cases.

See Marshall v. Sun Oil Co. (Delaware), 605 F.2d at 1334-35. In sum, "[t]o allow the employer an opportunity to answer its allegations, the Department should reveal its basis for making them, even though that basis is only circumstantial evidence. But the Secretary has no obligation to 'prove' to the employer that he has committed acts of discrimination." *Marshall v. Hartford Fire Insurance Co.*, 78 F.R.D. at 105.

It is important to " 'evaluate one party's efforts with an eye to the conduct of the other party.' " *See EEOC v. Prudential Federal Savings and Loan Association*, 763 F.2d at 1169 (quoting *Marshall v. Sun Oil Co.*, 605 F.2d 1331, 1335 (5th Cir.1979)). In this case, defendant rejected the EEOC's first conciliation proposal. Defendant did not even respond to the second and third conciliation offers.

In fact, the evidence suggests that Westinghouse never gave serious consideration to the possibility of conciliation. Mr. Saltman, Chief Counsel for Human Resources for Westinghouse, testified that he decided that the EEOC was acting in bad faith and was conducting a "sham conciliation, investigation and determination process. . . ." *See* T. Sept. 10 at 65 l. 7-10. This arrogant attitude shot down plaintiff's efforts toward conciliation.

Westinghouse simply chose to play hardball. It took the position that it had not violated the ADEA, *see id.* at 56-66; P.Ex. 4C. Given the Company's position, the EEOC appropriately acted. "[C]ourts have held that the Secretary is not required to continue conciliation efforts after the defendant has stated that it believes it has not been guilty of wrongdoing but may proceed to litigation to determine that issue." *See Marshall v. American Motors Corp.*, 475 F.Supp. 875, 879 (E.D.Mich.1979).

3. The Statute of Limitations And Relation Back Of Amended Complaints

Westinghouse's third affirmative defense is that the claims asserted in the EEOC's amended complaints are barred by the statute of limitations.[9] The EEOC argues

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[9] The EEOC's original complaint was filed on November 12, 1983. That complaint concerned Westinghouse's denial of LIB to named individuals "and all other terminated or laid-off employees aged 60 and older who were eligible for early retirement benefits and or received early retirement benefits." On August 23, 1984, the EEOC filed its first amended complaint. The amended complaint alleged the following violations of the ADEA at Westinghouse's Lester, and Concordville, Pennsylvania facilities:

(1) denying layoff income benefits to employees laid off prior to July, 1982 who were eligible for any type of retirement;

(2) after July, 1982, giving laid off employees the option of selecting either LIB or retirement, but not both;

(3) forcing laid off employees to retire prior to age 70 because LIB was not available;

(4) denying early retirement to laid off employees who chose LIB;

(5) denying recall to work to employees who were laid off and forced to retire; and

(6) giving lower retirement benefits to laid off employees who were not eligible for retirement because of age at the time of their layoff, but who later became qualified for retirement benefits.

The EEOC filed its second amended complaint on September 25, 1984. That complaint reiterated the six violations set forth in the first amended complaint, but alleged that they were nationwide.

that these claims "relate back" to its original complaint and are therefore within the statute of limitations.

The amended complaints in this case pose two problems. First, I must determine whether the EEOC is barred from adding the five new issues that appeared in its first and second amended complaints. Second, I must determine whether the EEOC is barred from broadening the scope of the case to a nationwide challenge, in effect adding new plaintiffs. I conclude that neither the additional allegations nor the broadened scope are barred by the statute of limitations.

Under Rule 15(c) of the Federal Rules of Civil Procedure, an amended complaint that would otherwise be barred by the statute of limitations is considered timely if it "relates back" to the original complaint. Relation back is permitted whenever "the claim . . . asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading . . . ." *See* Fed.R.Civ.P. 15(c). Rule 15(c) is liberally interpreted and applied. *See Unicure, Inc. v. Thurman*, 97 F.R.D. 1, 6 (W.D.N.Y. 1982).

Standards for the application of Rule 15(c) ensure defendants of notice of the conduct that is ultimately challenged in court. *See Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1259-60 n. 29 (9th Cir.1982), *cert. denied*, 459 U.S. 1227 (1983). Fair notice of the general fact situation at issue is deemed sufficient. *See* 3 J. Moore, Moore's Federal Practice ¶ 15.15[3] (2d ed. 1985).

Thus, under the rule's "conduct, transaction, or occurrence" test, "an amendment need only spring from the same core event or transaction as that set out in the original complaint," *see Drakatos v. R.B. Denison, Inc.*, 493 F.Supp. 942, 845 (D.Ct.1980). The addition of new theories of recovery similarly is permissible when the new

claims are not "based on events different from or in addition to those set out in the original complaint." *See Baruah v. Young*, 536 F.Supp. 356, 364 (D.Md.1982); *see also Santana v. Holiday Inns, Inc.*, 686 F.2d 736, 739 (9th Cir. 1982).

The concept of notice also guides the addition of parties. "In deciding whether an amendment relates back to the original claim, notice to the opposing party of the existence and involvement of the new plaintiff is the critical element." *Avila v. Immigration and Naturalization Service*, 731 F.2d 616, 620 (9th Cir.1984). Thus, relation back depends upon whether defendants "[a]t some point . . . have notice of who their adversaries are." *Leachman v. Beach Aircraft Corp.*, 694 F.2d 1301, 1309. Such notice exists when there is an identity of interests between the old and new plaintiffs. *See id.*; *see also* 3 J. Moore, *supra*, at 15.15[4.-2].

I find that the issues added in the EEOC's first amended complaint relate back to the original complaint. Like the original complaint, the five allegations added in the EEOC's first amended complaint are concerned with defendant's denial of LIB to persons eligible for retirement. Thus, they involve the same "transaction, occurrence, or core events" that appeared in the original complaint.

I find that the expansion of the scope of the litigation in the EEOC's second amended complaint also relates back to the original complaint. Westinghouse knew that its severance pay plans were targeted by the EEOC. These plans were in effect nationwide. Thus, Westinghouse knew that the Commission's challenge could apply to any and all of its facilities. Similarly, to the extent that the expansion of the case added new parties on the plaintiff's side, the new and the old parties have an identity of interest; namely, claims arising out of defendant's

severance pay plans. Westinghouse thus had reason to know that any employee affected by the challenged policies was a potential party to this case.

In sum, the issues and interests have remained the same throughout this litigation. The heart of the matter is the legality under the ADEA of defendant's severance pay, pension, and retirement programs.[1] I will now consider those programs.

The Validity Under the ADEA of Westinghouse's Severance Pay, Retirement, and Pension Plan Arrangements

The standards for determining whether an employer has engaged in age-based employment discrimination are borrowed from Title VII jurisprudence, *see Massarsky v. General Motors Corp.*, 706 F.2d 111, 117 (3d Cir. 1983), *cert. denied*, 464 U.S. 937 (1983). Plaintiffs may proceed under two theories. Under the disparate treatment theory of discrimination, plaintiffs must demonstrate intentional discrimination; that is, that an employer expressly applies age-based standards in its treatment of employees. *See id.* at 117. Under the disparate impact theory of discrimination, plaintiffs must demonstrate that an employer's application of facially neutral criteria disproportionately and adversely affects older employees, and cannot be justified by business necessity. *Id.*

The EEOC's challenge of seven separate Westinghouse policies presents four legal issues. These are:

(1) whether Westinghouse's denial of LIB and MSA to laid off, retiring employees violates the ADEA;

(2) whether ARP I and ARP II violated the ADEA;

(3) whether Westinghouse's limitation of retirement benefits to employees actually eligible for retirement at the time of layoff, and its limitation of death prior to

retirement benefits to spouses of employees actually eligible for the benefits at the time of death, violates the ADEA; and

(4) whether Westinghouse's impact number process violates the ADEA.

The first three issues fall within disparate treatment analysis, while the last issue falls within disparate impact analysis. I will begin with the three disparate treatment issues.

The Disparate Treatment Issues

Under the disparate treatment theory of discrimination, the plaintiff ultimately must demonstrate that the defendant engaged in purposeful or intentional discrimination. *Id.* This task is customarily broken down into several steps. *See id.* at 117-18; *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (pattern of proof of disparate treatment).[10]

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[10] *McDonnell Douglas Corp. v. Green* involved a Title VII claim of intentional race discrimination. The Court set forth the basic pattern of proof giving rise to an inference of discrimination. Under this pattern, a plaintiff can establish a prima facie case by showing:

> (1) that he belongs to a racial minority,
>
> (2) that he applied for and was qualified for a job for which the employer was seeking applicants,
>
> (3) that, despite his qualifications, he was rejected, and
>
> (4) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

While *McDonnell Douglas* embodies the classic pattern of proof of employment discrimination, it does not rigidly constrain the form of Title VII or ADEA cases. It is merely one way of establishing "an inference of discrimination . . . because the conduct at issue is presumed to be based on consideration of impermissible factors in

"[T]he plaintiff has the initial burden to establish a prima facie case of unlawful discrimination by a preponderance of evidence." *See Massarsky*, 706 F.2d at 118. This may be done by direct or circumstantial evidence. *See Maxfield v. Sinclair International*, 766 F.2d 788-91 (3d Cir. 1985). Once the plaintiff has established a prima facie case, the employer's burden is to "dispel the adverse inference" by "articulating 'some legitimate, non-discriminatory reason'" for its actions. *See Massarsky*, 706 F.2d at 118 (quoting *McDonnell Douglas*, 411 U.S. at 802). Once the employer has made this articulation, "the plaintiff must then prove that the asserted reason was merely a pretext for unlawful discrimination." *Id.*

The ultimate burden of persuasion is at all times with the plaintiff. *Id.* Thus, an ADEA plaintiff must show either that age was a determinative factor in the employer's decision, *Smithers v. Bailar*, 629 F.2d 892, 897-98 (3d Cir.1980), or that the employer's policy is discriminatory on its face. *Massarsky*, 706 F.2d at 119.

Finally, the employer may escape liability under the ADEA if it can demonstrate that its policy is within one of the statutory exceptions. These exceptions provide affirmative defenses to an employer who would otherwise be found to have engaged in age-based discrimination.[11]

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the absence of another explanation." *Smithers v. Bailar*, 629 F.2d 892, 895 (3d Cir. 1980). The nature of the showing that will create such an inference varies upon the circumstances of each particular case. *See Massarsky v. General Motors*, 706 F.2d 111, 118 n.13 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983). Thus, the *McDonnell Douglas* formulation has been adapted to a number of different fact patterns under both Title VII and the ADEA.

[11] Exceptions to the ADEA provide five affirmative defenses. These are: the "bona fide occupational qualification" defense, "reasonable factors other than age" defense, "bona fide seniority system" defense, "bona fide employee benefit plan" defense, and "discharge for good cause" defense. *See* 3 A. Larson & L. Larson, *Employment Discrimination* § 100.00 (1984).

See Trans World Airlines v. Thurston, —— U.S. ——, 105 S.Ct. 613, 622 (1985).

1. Denial of Severance Pay to Retiring Employees

This issue embraces Westinghouse's pre-July, 1982, LIB and pension plans, its post-July, 1982, LIB and pension plans, and its MSA and managerial pension plans. The validity of these programs depends on whether the ADEA permits denial of severance pay to laid off employees who retire and take their pension benefits.[12]

I find that Westinghouse's denial of severance pay to employees who take retirement is age-based discrimination.[13] Defendant's programs give employees who are eligible for retirement no practical choice but to take retirement benefits and forego severance pay. Therefore, receipt of severance pay is conditioned upon non-retirement status, and laid off workers are treated differently on the basis of age.

Westinghouse asserts that its programs have a "legitimate, non-discriminatory" justification. This justification is defendant's purported policy against "double dipping"

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[12] The post-July, 1982, program provides laid off employees with an option between LIB and pension benefits. In practice, this "option" is not a practical choice for employees, because selection of LIB means forfeiture of insurance and medical benefits. *See, e.g.*, T. Sept. 5, 132-133; Sept. 6, 7-9, 79-82. In any event, provision of the option does not alter the fact that older employees cannot receive both LIB and their full pension benefits. The option feature therefore does not correct the program; rather, Westinghouse devised the "option" as a sham to prolong the litigation of this issue.

[13] In *EEOC v. Westinghouse*, 725 F.2d 211 (3d Cir. 1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 92 (1984), the Third Circuit found that the EEOC had established a case surviving summary judgment that the Company's pre-July, 1982, program violated the ADEA. On that record, the Court rejected the assertion that the plan was based on reasonable factors other than age or a bona fide benefit plan. *See id.* at 222-23. The case was remanded. *See id.* at 225.

into Westinghouse benefit programs.[14] According to Westinghouse, its benefit programs are designed to ensure each laid off employee a "stream of income"; however, each income stream may flow from only one source. Defendant thus argues that severance pay is not denied on the basis of age but on receipt of an income stream in the form of pension benefits.

This policy allegedly has existed since the 1960 inception of LIB. Westinghouse's Director of Compensation Benefits and Human Resources Program testified that "[t]he LIB plan never intended to have any relationship to retirees who had already been provided by the company with an income stream. We were not interested in providing the doubledip in the corporate coffers for retirees." *See* T. Sept. 5 at 64 l. 10-14.

I do not believe defendant's doubledipping rationale, because it is inconsistent. Specifically, the severance pay plans make an exception for employees age 59 with more than 10 but less than 30 years of service. If an employee in this category is laid off, he or she may receive LIB until attaining age 60.[15] At age 60, the employee can take full early retirement benefits, including medical insurance and a supplementary pension. *See* Jt.Ex. 13 at 4; Jt.Ex. 14 at 7. This arrangement is contrary to the alleged doubledipping rule. No such arrangement is provided for 57 year old employees with 30 years of service, who are one year shy of eligibility for selected retirement. Defendant supports its treatment of the 57 year olds with the alleged doubledipping rule. *See* T. Sept. 5 at 65-72.

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[14] Westinghouse apparently did not offer the doubledipping rationale to the Third Circuit. *See EEOC v. Westinghouse*, 725 F.2d 211 (3d Cir. 1984) (no mention of doubledipping argument); *see also* T. Sept. 4 at 65 l. 4-18 (statement of Westinghouse counsel that issue was not before Third Circuit).

[15] The LIB may not, however, be taken in lump sum form. *See* Jt.Ex. 13 at 4; Jt.Ex. 14 at 7.

Westinghouse attempts to explain this inconsistency by arguing that the exception for 59 year olds is a result of collective bargaining. It also insists that the exception is not doubledipping. *See* T. Sept. 5 at 66-67. This explanation does not wash. The collective bargaining process does not protect invalid plans, *see* 29 U.S.C.A. § 623(c). Moreover, Westinghouse's insistence that the 59 year olds do not doubledip, but the 57 year olds would, makes no sense.

Another inconsistency is defendant's assertion that severance pay "provide[s] the income stream only when [the employee] did not have an income stream from some other source," *see* T. Sept. 5 at 63 1, 18-25. In reality, severance pay is available to employees who have other sources of income. For example, if employees elect not to receive severance pay during the 12 month period after layoff, and obtain other employment during that period, they can still receive severance pay at the end of the period. *See id.* at 50 1. 7-18.

The doubledipping rationale is nonsense. Its unstated premise is that severance pay and pension benefits are fungible. In actuality, they are distinct benefits with different purposes. Severance pay is a short term separation allowance. It affords an employee breathing room to think through his situation and alternatives, and provides time to seek new employment without starving. In contrast, the pension is a provision for long term retirement. In short, severance pay is a fringe benefit related to length of service and the occurrence of a layoff. *See EEOC v. Westinghouse*, 725 F.2d at 224-25; *cf. EEOC v. Bordens, Inc.*, 724 F.2d 1390, 1396-97 (9th Cir.1984) (Borden's severance pay policy was a "simple fringe benefit" rather than a part of its retirement and pension benefits package). Pension benefits are not a substitute for severance pay.[16]

[16] Westinghouse itself recognizes the distinction between severance pay and pension benefits. In reference to MSA and PRIP,

Westinghouse denies that its policy discriminates on the basis of age. Defendant asserts that the criterion for receipt of severance pay is not age but non-retirement status. I reject this argument. Age and retirement are, in fact, so closely linked that a criterion based on one is a criterion based on the other. *See EEOC v. Bordens, Inc.*, 724 F.2d 1390, 1393 (9th Cir.1984) (rejecting a severance pay arrangement similar to Westinghouse's); *EEOC v. Curtiss-Wright Corp.*, 34 Empl. Prac.Dec. ¶ 34,483 (CCH) (D.N.J.1982) (age is a determinative factor when severance pay is based upon retirement status).

Massarsky v. General Motors Corp., upon which defendants rely, is distinguishable. *Massarsky* upheld a policy which insulated from layoff employees enrolled in an academic work-experience program. Although participants in the program tended to be young employees, the Court found that "[t]here is nothing to indicate that older persons were precluded from becoming GMI students. . . . We simply cannot infer that the Company was using student status as nothing more than a proxy for age. . . ." *Massarsky*, 706 F.2d at 119. In contrast, this case invites such an inference. Retirement status is not an age-neutral factor. Unlike enrollment in the GMI program, it is related solely to age.

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managerial employees were told "[t]hey are not a party of any contract of employment and no employee shall have any legal or other right to benefit under the plans." *See* Jt.Ex. 20 at 2. This characterization clearly differentiates MSA from pension benefits.

The fact that LIB and MSA are fringe benefits not required to be provided does not mean that Westinghouse may discriminatorily distribute them. *See Hishon v. King & Spalding*, —— U.S. ——, 104 S.Ct. 2229 (1984). "A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all." *Id.* at 2234; *see also Thurston*, 105 S.Ct. at 621 (applying *Hishon* to ADEA context).

Finally, Westinghouse invokes the bona fide employee benefit plan defense. *See* 29 U.S.C.A. § 623(f)(2). An employer claiming this defense must establish three things. These are: (1) that the employer was acting in observance of the terms of (2) a bona fide employee benefit plan (3) which is not a subterfuge to evade the purposes of the ADEA. *See Westinghouse*, 725 F.2d at 223. I conclude that Westinghouse has not established the second and third elements of the defense.

The second element requires the plan observed to be "a bona fide employee benefit plan." This generally means that the plan must exist and pay substantial benefits, *see EEOC v. Bordens, Inc.*, 724 F.2d at 1395 (citing *Marshall v. Hawaiian Telephone Co.*, 575 F.2d 763, 766 (9th Cir.1978)). Although the Westinghouse plans exist and involve real monetary benefits, its severance pay programs are not "employee benefit plans" within the meaning of the ADEA. *See Westinghouse*, 725 F.2d at 224-25. Severance pay lacks the characteristics of true employee benefit plans. *See id.* at 224; *Bordens*, 724 F.2d at 1396. The severance pay and pension plans interact, but this does not mean they integrate. *See Westinghouse*, 725 F.2d at 225. A fringe benefit cannot be made part of a bona fide employee benefit plan, as here, "simply by artificially trying to tie the benefit to such a plan." *See Alford v. City of Lubbock*, 664 F.2d 1263, 1272 n. 12 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982) (analyzing denial of sick leave pay to employees not covered by state retirement plan).

Even if severance pay could be considered part of an employee benefit plan, Westinghouse has not established the third element of the bona fide employee benefit plan defense. Relying on *United Air Lines v. McMann*, 434 U.S. 192 (1977), defendant argues that its plan cannot be a subterfuge because it pre-exists the ADEA. *McMann* held that Congress did not intend to invalidate retirement plans that pre-date the ADEA, *see id.* at 203. The con-

tinued vitality of *McMann* is unclear.[17] *See* 1 H. Eglit, *Age Discrimination* § 16.-36 (1985). To the extent that *McMann* still has force, Westinghouse misapplies it. I therefore reject defendant's argument.

First, *McMann* does not insulate post-Act modifications of benefit plans. *See EEOC v. Home Insurance Co.*, 672 F.2d 252, 259 n. 9 (2d Cir.1982); *Sikora v. American Can Co.*, 622 F.2d 1116, 1124 (3d Cir.1980). Such modifications can be subterfuges. *See Home Insurance Co.*, 672 F.2d at 259. Westinghouse's plans have undergone negotiation, adjustment, and consideration many times since the passage of ADEA. It is therefore incorrect to characterize them as bona fide under *McMann*. They are, in fact, a subterfuge to evade the Act's proscription of age discrimination.

Second, defendant's *McMann* argument proves too much. It is true that an employer cannot intend to evade a non-existent law; thus, pre-Act conduct cannot be a subterfuge. This would be true even if the employer was in fact discriminating against older employees.[18] Once a law is in existence, however, the employer is aware of its prohibitions. Post-Act reaffirmation of prior discriminatory practices, such as defendant's, therefore amounts to evasion of the Act. This is not to say that an employer

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[17] When Congress amended the ADEA in 1978, it explicitly rejected *McMann*. *See* H.R.Rep. No. 950, 95th Cong., 2d Sess. 8, *reprinted in* 1978 U.S.Code Cong. & Ad.News 528, 529. The conferees "specifically disagree[d] with the Supreme Court's holding and reasoning in that case." *Id.* The conferees also expressed their belief that "[p]lan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact that they antedate the act or these amendments." *Id.*

[18] This is not the same as saying that pre-Act plans necessarily were free of discriminatory purposes. Intention to discriminate does not arise simultaneously with a law; rather, the law recognizes it as illegal.

must predict which details of its plans would be declared violations of the Act if challenged in court. Nonetheless, it is too much to say that any pre-Act practice can *never* be a subterfuge simply by virtue of its continuation, with few or no changes, after passage of the ADEA.

In sum, I am not persuaded by Westinghouse's purported "no doubledipping" rationale; instead, I find that it is a pretext for discrimination on the basis of age. I also find that Westinghouse cannot invoke the ADEA's "bona fide employee benefit plan" exception. I therefore conclude that Westinghouse's denial of severance pay to retiring, laid off employees violates the ADEA.

The Legality Under the ADEA of ARP I and II

The ADEA prohibits mandatory retirement prior to age 70. *See* 29 U.S.C.A. §§ 623(f), 631(a).[19] This prohibition extends to forced retirements. It also extends to unlawfully induced "voluntary" retirements. *See* B. Schlei & P. Grossman, *Employment Discrimination Law*, 519 (2d ed. 1983). "If pressure, subtle or otherwise, is used to encourage 'voluntary' retirement, liability may result." *Id.* The EEOC asserts that ARP I and ARP II illegally induced employees to retire. This argument has two components. First, the EEOC contends that employees would not have participated in ARP if they could have received both pension benefits and severance pay. Second, the EEOC contends that employees were induced to participate in ARP because of the manner in which defendant notified them of layoff and informed them of their options.

To the extent that the first component of the argument complains of employees' inability to obtain both severance

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[19] This is subject to an exception for employees who, for at least two years prior to the retirement, were in executive or high policy-making positions, provided that they receive a minimum level of pension benefits. *See* 29 U.S.C.A. § 631(c)(1).

pay and pension benefits, I have already determined that the practice is illegal. The remaining portions of plaintiff's argument present the contention that the company unlawfully induced employees to participate in ARP and retire.[20]

The legality of providing enhanced benefits to encourage early retirement is not always clear. *See* 1 H. Eglit, *supra*, at § 16.39B (Supp. Aug. 1985). Nonetheless, plans such as ARP I and II, which provide benefits to encourage early retirements and thereby forestall layoffs of younger workers, are permitted. *See, e.g., Patterson v. Independent School District #709*, 742 F.2d 465 (8th Cir.1984); *Sutton v. Atlantic Richfield Co.*, 646 F.2d 407, 420 & n. 4 (9th Cir.1981); *Mason v. Lister*, 562 F.2d 343 (5th Cir.1977). Such enhanced benefit plans do not give employers "the power to forcibly retire older workers," and are not subterfuges to evade the Act. *See Mason*, 562 F.2d at 346. They are "strictly optional with the employees." *See id.*

On the record in this case, the ARP provisions are protected by the ADEA's exemption of bona fide pension plans. The coercion here lay not in the availability of ARP benefits but in the denial of severance pay.

The Restriction of Death Prior to Retirement Benefits And Retirement Benefits to Employees Actually Eligible at the Time Of Death Or Layoffs

The EEOC claims that it does not challenge Westinghouse's minimum age and service requirements for receipt of death prior to retirement benefits and regular retirement benefits. Instead, the Commission claims to challenge the manner in which the minimum requirements are applied. In the Commission's view, Westinghouse

[20] The ARP issues received sparse treatment in both the record and the post-trial briefs. I find that plaintiff did not meet its burden of proof on this record.

should continue to confer such benefits on employees who actually meet both criteria at the time of death or retirement, and *also* should confer such benefits on employees who die or are laid [sic] with minimum years of service but without the minimum age. The Commission proposes that these employees, or their spouses, should begin to receive such benefits when the employees would have met the minimum age requirements if they had not died or been laid off. The Commission contends that any other arrangement is illegal under the ADEA because it would impose an age-based penalty upon employees who involuntarily end their employment with Westinghouse. In short, the Commission attacks the minimum age requirements of the benefit plans, while pretending not to do so.

While there appears to be no authority directly addressed to this specific contention, this is probably attributable to the fact that such a farfetched argument has never before been raised. The short answer to the EEOC's contention is that the defendant's arrangements are protected by the ADEA's exemption of bona fide pension plans. Every retirement plan contains some age-based distinctions which are necessarily "arbitrary." For example, a retirement plan providing benefits at age 70 would "discriminate" against 65 year old employees. The ADEA exemption for bona fide pension plans permits such legitimate line drawing. *See* S.Rep. No. 493, 95th Cong., 2d Sess. 9-10, *reprinted in* 1978 U.S.Code Corg. & Ad.News 504, 512-13; *cf. Christensen v. Equitable Life Assurance Society of the United States*, 767 F.2d 340, 342 (7th Cir.1985) (absent purposeful discrimination, a negative impact on pension benefits caused by early disassociation from employment is not discriminatory).

The Disparate Impact Issue: The Impact Number Process

The EEOC's [sic] challenges the impact number process under the disparate impact theory of discrimination. This theory invalidates facially neutral practices that

disproportionately affect a protected class unless the employer can justify the practice as a business necessity. *See Massarsky v. General Motors Corp.*, 706 F.2d at 117.

Proof of discriminatory motive is not necessary in a disparate impact case. *See Geller v. Markham*, 635 F.2d 1027, 1031 (2d Cir.1980), *cert. denied*, 451 U.S. 945 (1981). A prima facie case may instead be established by statistics "from which it may be inferred that an employer's . . . criteria" generate disproportionately adverse results. *See id.* at 1032. That is, the plaintiff must show that the practice has a " 'significantly discriminatory impact.' " *See Massarsky*, 706 F.2d at 120 (quoting *Connecticut v. Teal*, 457 U.S. 440 (1982)). Once a prima facie case has been established, the employer may defend its practice by demonstrating that it is justified by business necessity. *Id.* The plaintiff may then rebut the defendant's argument by showing that the employer's practice is a mere pretext for discrimination.

The disparate impact theory was developed under Title VII. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Westinghouse contends that the EEOC cannot proceed under the theory in the ADEA context. The Third Circuit has not ruled on this question, *see Massarsky*, 706 F.2d at 120 (declining to decide the issue). Nonetheless, other circuits have applied the disparate impact model to age discrimination cases. *See, e.g., EEOC v. Bordens, Inc.*, 724 F.2d 1390 (9th Cir.1984); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686 (8th Cir.1983); *Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981).

I am persuaded that disparate impact analysis under the ADEA is appropriate. As I have already noted, Title VII and the ADEA are parallel statutes, *see Lorillard v. Pons*, 434 U.S. 575 (1977); the disparate impact model should apply in both contexts. *See Borden's*, 724 F.2d at 1394-95; *see also Geller*, 635 F.2d at 1032; *Equal Em-*

ployment Opportunity Commission v. Governor Mifflin School District and Governor Mifflin Education Association, No. 85-0241, slip op. at 12-17 (E.D.Pa. Oct. 9, 1985).

Although I find the disparate impact model applicable, I do not find that this case fits the model. The Commission's statistical expert testified that "older workers who were employed at the time an impact number was announced were less likely to be covered by the impact number than were younger workers." T. Sept. 10 at 140 l. 19-22. Thus, the tendency for older workers to be laid off without an impact number was statistically significant. *Id.* at 148-49. Westinghouse argues that older employees were not disadvantaged by the system because their seniority insulated them from the reduction in force. The Company also argues that the process is based upon a bona fide seniority system and is therefore exempt from the ADEA. *See* 29 U.S.C.A. § 623(f)(2). The EEOC acknowledges the "*de facto* linkage" between the seniority system and the impact number process. In fact, it asserts that this linkage causes the process to have its discriminatory effects. *See* Plaintiff's Post-Trial Memorandum at 57. The Commission's factual analysis is correct, but its legal conclusion is not.

The linkage between the impact number process and the seniority system is what makes the impact number process a legitimate practice under the ADEA. The ADEA expressed a legislative desire to preserve seniority systems by tolerating such side effects. *See* S.Rep. No. 492, 95th Cong., 2d Sess. 9-10, *reprinted in* 1978 U.S.Code Cong. & Ad.News 504, 512-13. The ADEA's exception for seniority systems thus insulates the "last hired, first fired" practice that underlies defendant's impact number process.

The benefits of the impact number program may well be illusory. The EEOC's expert witness testified that

> the individuals who were covered by the impact number generally could not make much use of it because they did not meet the 15 year service requirements whereas individuals who were laid off after the impact number generally could have taken advantage of it in much larger numbers had they been included in the impact number reduction. It had the effect of giving impact numbers to those who couldn't use them and withholding impact numbers from those who could have used them to get . . . special benefits.

T. Sept. 10 at 152 l. 6-15. Nonetheless, the plan does not violate the ADEA. Delayed layoffs of older employees, which resulted in the unavailability of impact numbers for them, stemmed from the operation of a bona fide seniority system.

Willfulness

An employer's willfulness has two consequences under the ADEA. First, it triggers application of a three year statute of limitations. Second, it triggers availability of liquidated damages.

There has been some disagreement among the courts regarding the appropriate standard of willfulness. There also has been disagreement over whether the same standard should apply in both the statute of limitations and liquidated damages contexts. The Supreme Court recently clarified the standard of willfulness for liquidated damages, but declined to resolve whether the same standard should govern the statute of limitations. *See Trans World Airlines, Inc. v. Thurston*, —— U.S. ——, 105 S.Ct. 613, 625 & n. 21 (1985).

Under *Thurston*, an employer is liable for liquidated damages if " 'the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.' " *Thurston*, 105 S.Ct. at 624. This standard requires more than a realization that the ADEA

might apply. It is therefore more favorable to employers than the "knew that the ADEA was 'in the picture'" standard formerly applied by some courts. *See id.* at 625. On the other hand, it does not require intentional violations. *See id.* at 624 n. 19. An employer will be liable for liquidated damages if it acted in " 'reckless disregard' of the requirement of the ADEA." *Id.* at 626.

The EEOC and Westinghouse agree that *Thurston* governs willfulness with respect to liquidated damages. They disagree, however, on whether *Thurston* also governs willfulness with respect to the statute of limitations. Plaintiff urges that the statute of limitations should be governed by the "in the picture" standard formulated in *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139 (5th Cir.1971), *cert. denied*, 409 U.S. 948 (1972). Defendant advocates uniform application of the *Thurston* standard.

I find that Westinghouse acted willfully under the *Thurston* standard.[21] There is ample evidence that Westinghouse "acted in 'reckless disregard' of the requirements of the ADEA." *Thurston*, 105 S.Ct. at 626.[22] De-

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[21] Since *Thurston*, the courts have not resolved whether the term willful carries more than one meaning in the ADEA. In the Third Circuit alone, the courts are divided. *Compare Equal Employment Opportunity Commission v. Governor Mifflin School District and Governor Mifflin Education Association*, No. 85-0241, slip op. at 7-11 (E.D.Pa. Oct. 9, 1985) (standards are different) *with Slenkamp v. Borough of Brentwood*, 603 F.Supp. 1298 (W.D.Pa. 1985) (standards are the same). The problem does not need to be resolved in this case. Because I find willfulness under the standard most favorable to defendant, it follows that Westinghouse is both liable for liquidated damages and subject to the three-year statute of limitations.

[22] Willfulness is an issue of fact. *See Slenkamp v. Borough of Brentwood*, 603 F.Supp. at 1302; *Marshall v. American Motors Corp.*, 475 F.Supp. 875, 883 (E.D.Mich. 1979). The burden of proof of willfulness for the purposes of liquidated damages is on the plaintiff. *See Blackwell v. Sun Electric Corp.*, 696 F.2d 1176, 1184

fendant has long had the ability and the resources to ascertain the law and to attempt compliance with it. It did not. Trial testimony established that the Westinghouse Human Resources Department employs knowledgeable in-house counsel with extensive experience in the field of employment discrimination. *See* T. Sept. 10, at 4-11. Counsel monitors the legality of Westinghouse policies and practices. *Id.* at 11-16. The Company provides counsel with the resources necessary to keep up with the law. *Id.* at 17-18. These facts alone do not indicate willfulness. Indeed, they might signify eagerness to comply with the law. Nonetheless, the evidence shows that the Company never seriously tried to comply with the ADEA. On the contrary, it ignored increasingly clear signs that its policies were illegal, and stubbornly resisted compliance.

In the face of successive letters of violation, Westinghouse failed to question or change its policies. When litigation ensued, Westinghouse still insisted on the validity of its policies. Westinghouse has every right to do this. On the other hand, its course of action suggests that it did not violate the ADEA by mere mistake. In fact, its denial of severance pay to older employees clearly violated the ADEA. Nonetheless, Westinghouse turned its

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(6th Cir. 1983); *Kelly v. American Standard, Inc.*, 640 F.2d 974, 979 (9th Cir. 1981); 2 H. Eglit, *Age Discrimination* § 18.14 (1985).

There is some confusion with regard to who bears the burden of proof of willfulness for the purposes of the statute of limitations. *See* 2 H. Eglit, *supra*, at § 17.25. Some courts placed the burden upon the defendant by treating willfulness as an affirmative defense. *See, e.g., Marshall v. American Motors Corp.*, 475 F.Supp. at 883-84; *Marshall v. Eastern Airlines, Inc.*, 474 F.Supp. 364, 370 (S.D.Fla. 1979). This comports with "[t]he usual view . . . that statutes of limitations must be pleaded and proved as affirmative defenses. . . ." *See* 2 H. Eglit, *supra*, at § 17.26. Nonetheless, some courts place the burden upon the plaintiff. *See, e.g., EEOC v. Governor Mifflin School District*, slip op. at 10. Because I find plaintiff has established willfulness in this case, I need not resolve who actually bears the burden of proof.

face from "the handwriting on the wall" by ignoring successive judicial invalidations of plans similar to Westinghouse's. *See EEOC v. Bordens*, 724 F.2d 1390 (9th Cir. 1984); *EEOC v. City of Altoona*, 723 F.2d 4, 7 (3d Cir. 1983).

Westinghouse never attempted to modify its arrangements. *See* T. Sept. 10 at 18-20. In 1982, Westinghouse changed its policy and provided an option between LIB and pension benefits. In 1985, a similar change was made for management employees. The Company's motivation, however, was to prolong and ameliorate the predictable unfavorable outcome in litigation over the plans. *See* T. Sept. 10 at 98 1. 3-6 (1982 change); T. Sept. 6 at 142-43 (1985 change).

Finally, the Third Circuit's ruling in the New Jersey case afforded some suggestion that at least the pre-1982 severance pay arrangements violate the ADEA. Nonetheless, the company continues to defend those arrangements, primarily through its "no doubledipping" rationale. This rationale simply is not credible. Despite the fact that defendant characterizes it as a long-standing corporate policy, it was first articulated in this litigation. I believe that the articulation is belated because the policy never existed.

Perhaps the most telling evidence of the Company's willfulness is its own argument that it acted in good faith.[23] Westinghouse's good faith argument is two-fold. First, it insists that its post-1982 arrangements were designed in reliance upon statements of EEOC Counsel made in the New Jersey litigation. Second, it argues

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[23] *Thurston* made clear that good faith is not a defense to willfulness. *See Thurston*, 105 S.Ct. at 625 n.22. Nonetheless, it also made clear that good faith is relevant to the issue of willfulness. *See id.* at 626. Thus, the Court found that TWA did not act willfully, because "TWA officials acted reasonably and in good faith in attempting to determine whether their plan would violate the ADEA." *Id.*

that its pre-1982 arrangements were designed before enactment of the ADEA. It therefore concludes that it acted in compliance with what appeared to be the law.

I have already discussed and rejected these contentions. They are feeble excuses. Westinghouse has mounted a stubborn, protracted and futile defense of the indefensible policy of denying severance pay to its older employees because they were eligible for pensions. Westinghouse acted in reckless disregard of the requirements of the ADEA in its denial of severance pay benefits to older employees. Westinghouse resisted conciliation and tried to turn plaintiff's conciliatory approaches into a weapon of defense. When it became clear that denying severance pay to those eligible for pensions was going to be found illegal by the Courts, Westinghouse devised a sham option arrangement to evade the ADEA and claimed, without basis, that it was relying on a government lawyer's argument for its own tactical decision. Westinghouse belatedly invented an alleged corporate policy against doubledipping to justify denying older workers their severance pay. The circumstantial evidence is overwhelming that Westinghouse showed reckless disregard for the matter of whether its pre-July 1982, and post-July, 1982, layoff income benefits and management separation allowance benefits violated the ADEA. I therefore award double damages to the injured employees who fall within the three year statute of limitations.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action Nos. 83-5457, 84-4799

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

v.

WESTINGHOUSE ELECTRIC CORPORATION

ORDER

AND NOW, this 26th day of March, 1986, it is hereby ORDERED that Westinghouse, its employees, agents, successors and assigns are enjoined from denying the LIB and MSA severance pay benefits specified in the annexed Memorandum to employees aged 40 or over, who are otherwise eligible for them, because such employees are also eligible for, or elect to receive, pension or retirement benefits to which they are entitled.

This Court's declaratory judgment as to liability is hereby entered in favor of plaintiff and against defendant on the LIB and MSA issues and in favor of defendant and against plaintiff on the other claims, in accordance with the attached Memorandum, there being no just reason for delay.

U.S. Magistrate Edwin E. Naythons is designated to serve as a Master, pursuant to Title 28 U.S.C. § 636 (b)(2) and Rule 53, to make the difficult computation of damages, after receiving such evidence and holding such hearings as are necessary. The Master shall prepare and file a report with his findings of fact and conclusions of law in accordance with Rule 53(e).

This Order is stayed for ten days and pending determination of an appeal.

BY THE COURT:

/s/ Marvin Katz
MARVIN KATZ, J.

RELEVANT STATUTES

1. Section 4(a)(1) of the Age Discrimination in Employment Act of 1967, as amended ("ADEA"), 29 U.S.C. § 623(a)(1), provides that:

> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . .

2. Section 4(f) of the ADEA, 29 U.S.C. § 623(f), provides, in part, that:

> It shall not be unlawful for an employer, employment agency, or labor organization—
>
> (1) to take any action otherwise prohibited under subsections (a) . . . of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age . . .;
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual . . . .

CASE SCHEDULED FOR ORAL ARGUMENT ON MAY 17, 1988

APPENDIX FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 87-5361 & 87-5362

CLYDE J. ARNOLD, JR., *et al.*,
Appellees,

v.

POSTMASTER GENERAL,
Appellant.

CHARLES R. NETHERTON, *et al.*,
Appellees,

v.

POSTMASTER GENERAL,
Appellant.

Appeal from the United States District Court
for the District of Columbia

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C.A. Nos. 85-2571 & 86-2291

* * * *

II. Even If Disparate Impact Analysis Is Used, The District Court Erred In Finding That The Directed Transfer Component Of The Career Path Policy Has An Adverse Impact On Postal Inspectors Aged 40 And Above

A *prima facie* case of disparate impact is usually made through statistical evidence that a specific "facially neutral" employment practice falls more harshly on members of a protected group than on other employees. *Griggs* v. *Duke Power Co.*, 401 U.S. 424; *Palmer* v. *Shultz*, 815 F.2d 84, 114 (D.C. Cir. 1987); *Contreras* v. *City of Los Angeles*, 656 F.2d 1267 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982). Whether there exists a statistical disparity sufficiently significant to establish a *prima facie* case is a question of fact. Although a district court's factual findings may not be set aside by a reviewing court unless clearly erroneous (*see* Fed. R. Civ. P. 52), this rule does not apply to findings that result from the application of incorrect legal principles. *Palmer*, 815 F.2d at 101; *Trout* v. *Lehman*, 702 F.2d 1094, 1100 (D.C. Cir. 1983), *vacated on other grounds*, 465 U.S. 1056 (1984).

The heart of this action is whether the various components of the CPP should be analyzed as an integrated "package" under the *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), line of cases or as separate, discrete practices under the *Connecticut* v. *Teal*, 457 U.S. 440 (1982), line of authority. *Gilbert* treats the employment practice "package" as the proper analytical focus. 429 U.S. at 138. *Teal* forbids a defense that focuses on "bottom line" employment statistics without taking into account individual components of an employment practice that serve as absolute barriers from the rest of the process. This case definitely falls within the *Gilbert* analysis.

Appellees' disparate impact claim and the District Court's ruling thereon addressed solely the directed

transfer component of the Career Path Policy. In isolating the Level 23 directed transfer component from the rest of the CPP "package" and finding that such transfers have an adverse impact on Postal Inspectors aged 40 and over, the District Court erred as a matter of law.

A. Disparate Impact May Not Be Established By Isolating One Component Of An Integrated Multi-Component Employment Policy

The Career Path Policy consists of three interdependent transfer components: (1) voluntary transfers by Level 23 Inspectors; (2) bids by Level 21 Inspectors for promotion to vacant Level 23 positions; and (3) seniority-based directed transfers of Level 23 Inspectors. At trial, the Inspection Service introduced statistical evidence which showed that when all transfers—both voluntary and directed—are considered, the overall transfer requirement of the CPP fell relatively equally on Inspectors below age 40 and Inspectors aged 40 and above, in comparison with their average availability for transfer during the relevant time period.[18] In rejecting this evidence and relying instead on statistics which focused exclusively on the directed transfer component of the three-part Policy, the District Court erred as a matter of law.

The clear weight of authority establishes that an integrated employment policy or practice, like the CPP, may not be "balkanized" into its constituent parts in order to establish or defeat a claim of disparate impact. In *General Electric Co.* v. *Gilbert*, plaintiffs claimed that their employer's disability plan impermissibly discriminated on the basis of sex by excluding pregnancy from the non-

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[18] The statistics showed that Level 23 Inspectors aged 40 and above constituted 34.3% of all Level 23 Inspectors eligible for transfer into MMAs during the relevant period and constituted 33.8% of all Inspectors actually transferred either voluntarily or involuntarily under the Policy. (DX 28, A. 93).

occupational sickness and accident benefits provided to all employees. The Supreme Court declined to engage in an item by item analysis of General Electric's disability plan, and instead analyzed whether the disability "package" was discriminatory—that is, whether the overall benefits to employees or the "aggregate risk protection" worked to discriminate against any definable group. *Id.* at 138. In this regard the Court stated:

> The "package" going to relevant identifiable groups we are presently concerned with . . . covers exactly the same categories of risk, and is facially nondiscriminatory in the sense that "[t]here is no risk from which men are protected and women are not. Likewise there is no risk from which women are protected and men are not." . . . As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits . . . .

429 U.S. at 138 (citation omitted); *see California Brewers Ass'n* v. *Bryant*, 444 U.S. 598, 605-11 (1980) (rule that an employee must work 45 weeks in a calendar year to be considered permanent must be analyzed as part of a "seniority system" under Title VII).

This basic principle in *Gilbert* was noted in *EEOC* v. *Governor Mifflin School District and Governor Mifflin Education Ass'n*, 623 F. Supp. 734 (E.D. Pa. 1985), a disparate impact case arising under the ADEA. There, the EEOC alleged that the school district's salary system had a disparate impact on teachers aged 40 and over because older, more senior teachers at the top steps of the pay schedule received smaller salary increases than did younger teachers at the lower steps. Rejecting this claim, the district court held:

> [T]he defendants are essentially correct that it would be improper to focus too narrowly on a par-

> ticular aspect of something like a compensation system. Such a system is designed to provide employees with an overall package of payroll benefits. The precise manner in which this is accomplished will obviously vary widely. It is true that the teachers at the top of the step system received the smallest increases, but they also received the highest pay. It is only when the amount of the pay increase is separated from all other aspects of the compensation system, and the amount given to the older teachers as opposed to the teachers with less seniority is examined in isolation, that anything remotely unusual can be seen. I believe that this dissection of the compensation sytem is improper.

Id. at 40.[19]

As the foregoing cases demonstrate, the District Court's dissection of the CPP was improper as a matter of law. Under the CPP, *all* eligible Level 23 Inspectors, *regardless of age*, were required to serve five years in a Major Metro Area. Further, *all* eligible Level 23 Inspectors, *regardless of age*, were afforded the opportunity to volunteer for this mandatory service before being faced with the prospect of a directed transfer. Finally, directed transfers of Level 23 Inspectors, *regardless of age*, oc-

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[19] *Accord Smith* v. *Troyan*, 520 F.2d 492, 498 (6th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976) ("Carried to its logical extreme . . . [analysis of subtests] would require the elimination of individual questions marked by poorer performance by a racial group, on the ground that such a question was a "subtest" of the "subtest."); *Kirkland* v. *New York State Department of Correctional Services*, 520 F.2d 420, 425 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976) (showing that overall examination procedure produces disparate results cannot be rebutted by fragmenting process); *Vulcan Society of the New York Fire Department, Inc.* v. *Civil Service Commission*, 360 F. Supp. 1265, 1272 (S.D.N.Y.), *aff'd*, 490 F.2d 387 (2d Cir. 1973) ("[T]he examination may not be truncated; whether or not it has an adverse discriminatory impact upon minority groups should be considered in terms of the total examination procedure.")

cured only if vacancies were not filled by volunteers or bids. Accordingly, the CPP "package" given to Level 23 Inspectors who were over 40 years of age contained the same "benefits" and "detriments" as the "package" given to those who were under 40 years of age. *See General Electric Co.* v. *Gilbert*, 429 U.S. at 138.[20] There were no disadvantages suffered by those who were over 40 that were not suffered by those who were under 40. Nor were there any benefits afforded to those who were under 40 that were not afforded to those over 40. *Id.* The transfer "package" cannot therefore be said to discriminate against Inspectors over 40 years of age. *Id.*[21]

The District Court rejected the "package" approach to the analysis of the CPP, claiming instead that appellees' challenge was *solely* to the directed transfer component of the Policy and *not* to the aspect of the Policy that permitted Inspectors to volunteer for lateral assignments. 667 F. Supp. at 20. However, the interrelatedness of the components and the necessity to treat the entire CPP as a package was confirmed by the District Court's own inability to keep the components of the Policy separate. Indeed, the District Court held that Inspectors aged 40 and over who *voluntarily* transferred had *standing* to challenge the *directed* transfer component of the CPP because these Inspectors "were forced to volunteer for a lateral reassignment to an undesirable major metropolitan area to avoid a directed transfer to an even less desirable major metropolitan area." 667 F. Supp. at

[20] The only difference between the "packages" was one that in fact *favored* those in the protected class. As previously discussed, Inspectors within five years of retirement, and thus, aged 45 years or older, were exempt from the transfer Policy.

[21] Age discrimination should not be found to exist simply because Inspectors 40 and over chose to volunteer for transfers at a lower rate than those under 40. *See* n.8, *supra*. By exercising this option, the 40 and over group necessarily subjected themselves to greater incidences of directed transfers.

17.[22] Thus, as the District Court ruled, and as individual class members themselves testified, "voluntary" transfers were factually indistinguishable from directed transfers under the Policy. Having so found, the conclusion that the voluntary and directed transfer components of the CPP must be analyzed statistically as a package is inescapable.

The District Court's additional conclusion that "discriminatory transfers of some Level 23 Postal Inspectors cannot be justified by its exemption of other Level 23 Postal Inspectors," is also misplaced. 667 F. Supp. at 20. In so ruling, the District Court not only continued its improper focus on a single component of this integrated employment policy, but also apparently confused the Inspection Service's statistical case with the "bottom line" approach rejected in *Teal* v. *State of Connecticut*, 645 F.2d 133 (2d Cir. 1981), *aff'd*, 457 U.S. 440 (1982). Far from precluding appellant's statistical argument, *Teal* lends further support to the Inspection Service's case.

In *Teal*, plaintiffs challenged a written examination as having a disparate impact on black applicants for certain supervisory positions with a Connecticut state agency. The state defended on the basis that, because the actual promotion rate for black candidates was higher than that for white candidates, plaintiffs could not prevail on a claim of disparate impact by separately challenging the written examination. The Second Circuit rejected this defense and the Supreme Court affirmed. The Court stressed that the principal focus of Title VII was the

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[22] Quite obviously, the same concerns that "forced" some Inspectors 40 years of age and over to voluntarily transfer also impelled Inspectors under 40 to seek voluntary reassignment. Indeed, the Inspection Service introduced evidence that 96% of those volunteering either were eligible or would have been eligible for directed transfers had they not volunteered. (DX 28, Chapter 4; A 93; TR 277-79).

protection of individual opportunities, not class rights. 457 U.S. at 451, 453-56. Limitation of the opportunities of one group of individuals could not be excused by favorable treatment of another group of the same class. *Id.*

In *Teal*, one group of black individuals was absolutely barred from promotion because of the employer's use of a discriminatory test, while another, separate group of blacks was given favorable treatment in promotion. There was no overlap between the two groups; those who failed the test were ineligible for favorable treatment when the actual promotion selections were made. The Second Circuit had recognized this factor in distinguishing its earlier decision in *Kirkland*:

> While we noted in *Kirkland v. New York State Department of Correctional Services*, 520 F.2d 420, 425 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976), that proof concerning the disparate impact of certain sub-tests was of "little relevance . . . on the issue of whether or not the examination as a whole had an unconstitutional discriminatory impact," there, the passing grade was dependent upon the cumulative results of the sub-tests. Thus, all of the candidates in *Kirkland* were exposed to the challenged selection device in its entirety, and therefore, were able to benefit from the components of the exam that apparently offset the allegedly discriminatory sub-test. In other words, all of the candidates in *Kirkland* were subjected to the complete selection process, which, when viewed as a whole, did not produce unlawful disparate results.

645 F.2d at 137-38.[23]

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[23] *See Sengupta* v. *Morrison-Knudson*, 804 F.2d 1072, 1077 (9th Cir. 1986); *Brunet* v. *City of Columbus*, 642 F. Supp. 1214, 1224-25 (S.D. Ohio 1986), *appeal dismissed without op.*, 826 F.2d 1062 (6th Cir. 1987); *Contreras* v. *Carlin*, 38 FEP Cases 1328, 1332 (C.D. Cal. 1985).

The Supreme Court affirmed the Second Circuit's further distinction between those types of cases in which dissection of an employment practice or policy would be inappropriate and those cases in which such dissection is permissible:

> Where all the candidates participate in the entire selection process, and the overall results reveal no significant disparity of impact, scrutinizing individual questions or individual sub-tests would, indeed, "conflict[] with the dictates of common sense." . . . Where, however, an identifiable pass-fail barrier denies an employment opportunity to a disproportionately large number of minorities and prevents them from proceeding to the next step in the selection process, a different result must obtain.

Id. at 138 (citation omitted). Accordingly, as the Supreme Court repeatedly emphasized in its opinion, in the latter type of case where certain individuals are *not* being exposed to the entire process, but instead, are being eliminated from further consideration based on a particular component of the process, that component of the process can in fact be segregated for independent analysis. Only under such circumstances, however, is it appropriate to analyze a component of an employment practice in isolation. 457 U.S. at 145-46.

There is little doubt that this case falls squarely within the class of cases identified in *Teal*, and discussed *supra* at pp. 26-28, where examination of an isolated segment of the CPP "conflict[s] with the dictates of common sense." 645 F.2d at 138. As previously discussed, *all* Level 23 Inspectors were exposed to and "affected by" the entire CPP transfer procedure. (*See* p. 6-7, *supra*). Unlike *Teal*, the directed transfer component of the Policy did not represent a barrier which excluded any identifiable group of individuals from exposure to the rest of the process. To the contrary, as the trial testimony

confirms, those Inspectors who were ultimately subject to directed transfers had the opportunity to volunteer, but chose instead to forego this option.[24] Moreover, since transfers were not directed until all other means of increasing the experience level in MMAs under the CPP had been exhausted, those subject to directed transfers benefitted from the other components of the CPP by being able to delay their transfers until later in their careers. Indeed, at least one Inspector testified that, based on periodic notification he received from the Inspection Service regarding his ranking on the directed transfer seniority list, he was able to manipulate and delay the timing of his transfer to Washington, D.C. for several years. (Tr. 37-40).[25] In short, the evidence proffered by appellant clearly was not the class-wide "bottom line" analysis offered at the expense of individual victims of discrimination that was rejected by the Supreme Court in *Teal*.

This case plainly falls within the rationale discussed in the *Gilbert* line of cases, and is not undermined by *Teal*. In this case, all Inspectors were subject to the same transfer choices under the CPP regardless of their ages. Further, it is only when the directed transfer component is examined apart from the rest of the Policy that any impact on Inspectors 40 and over is observed at all. *See EEOC* v. *Governor Mifflin*, *supra*. Appellees' statistical analysis of the directed transfer component in isolation is thus legally insufficient to establish a disparate impact case. The District Court's acceptance of this approach constitutes reversible error.

* * * *

[24] Those Inspectors gave up the ability to have input into the timing and location of their transfers in favor of delaying the inevitable as long as possible.

[25] An Inspector who transfers to an MMA later in his career rather than earlier would necessarily be earning more money at the time of transfer. This may be viewed as an additional benefit to some in view of the higher cost of living in the MMAs. (DX 9A-C).

IV. The District Court's Finding That The Career Path Policy Was Designed Intentionally To Discriminate Against Inspectors Aged 40 and Above Results From The Application Of Incorrect Legal Principles And Is Clearly Erroneous

In concluding that appellee Inspectors had carried their burden of establishing a claim of disparate treatment, the District Court found that the statistical correlation between age and seniority coupled with the Inspection Service's knowledge of the alleged disparity created an inference of intentional discrimination. 667 F. Supp. at 27. The Court next rejected appellant's attempt to rebut any inference of discrimination by concluding that the justification offered by the Inspection Service for the senior-first rule was not a legitimate, nondiscriminatory reason, or alternatively, that the reason proffered was shown to be pretextual. *Id.* at 27-28.[33] The District Court's conclusions on these issues should be reversed.

First, it is important to note at the outset that intent to discriminate is a critical element in a disparate treat-

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[33] The Court also held that the Inspection Service "willfully" violated the ADEA, based on its factual finding that the Inspection Service designed the senior-first transfer rule with the intent to discriminate against Postal Inspectors aged 40 and over. In reaching this conclusion, the Court relied on the same analysis that it made in the disparate impact case. This sort of analysis has been rejected as an insufficient ground to justify a finding of willfulness. *Gilliam* v. *Armtex, Inc.*, 820 F.2d 1387 (4th Cir. 1987). Moreover, the finding of a willful violation is clearly erroneous for the same reasons that the finding of intentional discrimination is erroneous. In any event, courts have found that the liquidated damages awardable to claimants for willful violations of the ADEA are not available to federal sector employees. Thus, the willfulness standard may not be applied in a federal age discrimination case brought pursuant to 29 U.S.C. § 633a. *See Smith* v. *Office of Personnel Management*, 778 F.2d 258 (5th Cir. 1985), *cert. denied*, 476 U.S. 1105 (1986); *Chambers* v. *Weinberger*, 591 F. Supp. 1554 (N.D. Ga. 1984); *Wilkes* v. *United States Postal Service*, 548 F. Supp. 642 (N.D. Ill. 1982); *Muth* v. *Marsh*, 525 F. Supp. 604 (D.D.C. 1981).

ment claim. *Palmer*, 815 F.2d at 90-101. Here, the only direct evidence contradicts such an intent—appellant's witness testified that the purpose of the CPP was to generate experienced Inspectors in MMAs. Although a showing of discriminatory effect may be evidence of intent (*Id.* at 90-91), appellees' statistical evidence, which considered the senior-first rule in isolation is, for the same reasons discussed earlier, legally insufficient to establish a claim of disparate treatment. *See* Part II(A), *supra*. Moreover, the District Court's heavy reliance on the effect of the senior-first rule and appellant's purported knowledge of that effect is also insufficient to sustain a finding of disparate treatment. Indeed, discriminatory intent implies more than simply an awareness of consequences. *See Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 279 (1979). Rather, a conclusion that discrimination was intentional must be based on findings that the challenged action was taken *because of*, not just in spite of, its effect. *Id.* No such findings were made by the District Court in this case.

Second, the District Court committed fundamental legal error in requiring the Inspection Service to demonstrate a "valid need" for the directed transfer component of the CPP in order to rebut appellees' *prima facie* case. The employer's burden in a disparate treatment case is simply to articulate some legitimate nondiscriminatory reason for its actions. *Segar*, 738 F.2d at 1268-73. The employer is not required to prove that it was motivated by a nondiscriminatory reason, but simply to introduce evidence that would permit a rational conclusion that the employment decision had not been motivated by discriminatory animus. *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 257 (1981).[31] The Inspection

[31] The burden of persuasion does not shift to the defendant, but remains at all times with the plaintiff. *Burdine*, 450 U.S. at 255-56. It is worthy of mention that the District Court had to amend its opinion in order to state that it intended a "production" rather

Service's explanation at trial of its need for experienced Inspectors in MMAs and its reasons for believing the Policy would meet that need, clearly satisfied this burden. *See* Part III(B), *supra*.

Third, in analyzing whether pretext had been shown and appellees' ultimate burden of proving intentional discrimination carried, the District Court correctly noted that to prevail, appellees had to show that "age made a difference in defendant's decision to transfer them in the sense that, but for defendant's discriminatory motive, plaintiffs would not have been transferred." 667 F. Supp. at 27. However, far from showing that appellee Inspectors would not have been transferred "but for" the Inspection Service's use of an allegedly discriminatory senior-first criterion, the unrebutted evidence established that under the CPP *all* eligible Level 23 Inspectors were required to serve a tour of duty in an MMA *and* were in fact transferred under the policy. Thus, regardless of the means employed to effect directed transfers, all Level 23 Inspectors would nonetheless have been transferred during the relevant time period.

Further, in analyzing the issue of intent, the District Court ignored undisputed evidence that the *oldest* Inspectors (those within five years of retirement, who were all over 45), were expressly exempt from directed transfers by the Policy itself. Although it is true that discrimination against one group of workers cannot be excused by favorable treatment of another group (*Teal*, *supra*), in the disparate treatment context, evidence of the employer's treatment of protected employees as a class is certainly relevant to a determination of whether there was intent to discriminate. *See Furnco Construction Corp.* 438 U.S. at 579-80; *Palmer*, 815 F.2d at 84. Accordingly, the District Court erred in limiting its consideration solely to the senior-first directed transfer component of the CPP

than a "persuasion" burden in this regard. *See* Order of August 20, 1987.

rather than examining the CPP as a whole in determining the issue of intent.[35]

Fourth, the District Court's speculation that the Policy was "unnecessary" to insure that experienced Inspectors served in major cities, or that a random selection method would have met this need just as well, was irrelevant and legally deficient.[36] As the Eleventh Circuit stated in the analogous Title VII context:

> Title VII does not take away an employer's right to interpret its rules as it chooses, and to make determinations as it sees fit under those rules. "Title VII addresses *discrimination*." . . . Title VII is not a shield against harsh treatment at the work place. . . . Nor does the statute require the employer to have good cause for its decisions. The employer may . . . [take action respecting] an employee for a good reason, a bad reason, a reason based on erroneous facts, or no reason at all, as long as its action is not a discriminatory reason.

Nix v. *WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1187 (11th Cir. 1984) (citations omitted; emphasis in original), *see also Johnson* v. *Lehman*, 679 F.2d 918 (D.C. Cir. 1982).

Quite clearly, the District Court confused the order and elements of proof in a disparate impact claim with

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[35] By limiting its inquiry to the directed transfer component of the CPP, the District Court ironically succeeded in finding intentionally discriminatory transfers based upon facts which simply reflect the desire of many Inspectors to delay relocating for as long as possible. In other words, the Inspection Service's "animus" was apparently its decision to design a policy whereby individual Inspectors could delay, but not ultimately escape, the MMA tour of duty required of all Level 23 Inspectors. This is simply insufficient to demonstrate intentional age discrimination.

[36] Further, as discussed above, the evidence of record refutes the proposition that a random system would have been a viable alternative. *See* p. 43-45, *supra*.

the order and elements of proof in a disparate treatment case. By its emphasis on "valid needs" and "alternative procedures," the District Court held, in essence, that a finding of disparate impact necessarily impels a finding of disparate treatment. However, intent means doing something because of, not in spite of, a particular consequence. *See Personnel Administrator* v. *Feeney*, 442 U.S. at 279. Since the Inspection Service gave a "clear and reasonably specific" explanation (*see Burdine*, 450 U.S. at 268) for any statistical disparity and appellees offered no evidence to show that this explanation was pretextual, judgment should have been entered for appellant on the disparate treatment claims.

Finally, the District Court's conclusion that the senior-first rule violates the ADEA seems to contradict the very purpose of the statute. It is clear from the Congressional statement of findings and purpose set forth in the statute, as well as its legislative history, that the evil to which the ADEA was addressed was the assumption among employers that older workers were less capable than younger workers.[37]

The Career Path Policy, including the senior-first rule, is based upon exactly the opposite motivation: the Postal Service's desire to take better advantage of the skills of its more experienced (and thus older) Inspectors by assigning them to the areas with the most complex caseloads. The ADEA should not be interpreted to prohibit such a program, which seeks precisely "to promote employment of older workers based on their ability rather

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[37] Section 2(b) of the ADEA states that its purpose is "to promote employment of older persons based on their ability rather than age." 29 U.S.C. § 261(b). Senator Javits, one of the principal supporters of the Senate bill, explained the reason it was needed: "[T]here is simply a widespread irrational belief that once men and women are past a certain age they are no longer capable of performing even some of the most routine jobs." 113 Cong. Rec. 31253 (1967).

than age." 29 U.S.C. § 261(b). The District Court's holding to the contrary should therefore be reversed.

CONCLUSION

For all the foregoing reasons, the judgment of the District Court should be reversed.

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